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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 283

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MURRY GUGGENHEIM

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 4, 1932
CERTIORARI GRANTED OCTOBER 17, 1932

(36980)

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1

Before U. S. Board of Tax Appeals

Docket No. 43698

MURRY GUGGENHEIM, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For taxpayer: Arthur A. Ballantine (withdrawn), George E. Cleary, Esq., Elihu Root, jr., Esq.
For commissioner: Frank T. Horner, Esq.
Transferred to Mr. Arundell, 11/20/31.

Docket entries

1929
Apr. 16—Petition received and filed. Taxpayer notified. (Fee paid.)
" 17—Copy of petition served on general counsel.
June 17—Answer filed by general counsel.
" 19—Copy of answer served on taxpayer. General calendar.
1930
Jan. 21—Hearing set March 18, 1930.
" 31—Motion to postpone hearing for 90 days filed by taxpayer. February 3, 1930, granted and set June 16, 1930.
2 May 15—Notice of change of hearing to fall term, 1930.
Aug. 21—Hearing set November 5, 1930.
Nov. 5—Hearing had before Judge Murdock and Judge Phillips, called on merits. Stipulation of facts filed and received in evidence. Taxpayer's brief due Jan. 5, 1930; reply brief, April 5, 1930; commissioner's brief, March 5, 1930.
Dec. 1—Transcript of hearing Nov. 5, 1930, filed.
" 29—Brief filed by taxpayer. Mr. Phillips case.
1931
Mar. 5—Brief filed by general counsel.
" 11—Notice of withdrawal of Arthur A. Ballantine as counsel for taxpayer filed.
Apr. 3—Reply brief filed by taxpayer. April 7, 1931, copy served on general counsel.
" 10—Notice of appearance of G. E. Cleary as attorney of record filed by taxpayer.
Dec. 18—Opinion rendered, Mr. Arundell, div. 7. Decision will be entered under rule 50.
1932
Jan. 4—Notice of appearance of Elihu Root, jr., as counsel for taxpayer filed.
" 4—Notice of settlement filed by general counsel.
3 Jan. 6—Consent to settlement filed by taxpayer.
" 6—Decision entered, C. Rogers Arundell, div. 7.

Jan. 6—Motion to fix amount of bond at $3,600,000.00 filed by taxpayer.
" 6—Order fixing amount of bond at $3,600,000.00 entered.
" 9—Power of attorney and agreement filed.
" 9—Bond in the sum of $3,600,000.00 approved by C. R. Arundell, member, div. 7, and filed.
" 9—Petition of taxpayer for review in 2nd Circuit Court of Appeals filed.
" 11—Proof of service of petition filed.
" 11—Præcipe with proof of service thereon filed.

Before United States Board of Tax Appeals

[Title omitted.]

4 *Petition*

Filed April 16, 1929

The above-named petitioner hereby petitions for a redetermination of the deficiency in gift tax for the year 1925, determined by the respondent in his notice of deficiency, symbols MT-ET-GT-CL-68-JEK, dated March 8, 1929, and as the basis of such proceeding alleges as follows:

(a) The petitioner is an individual with his principal office at 120 Broadway, New York, New York.

(b) The notice of deficiency dated March 8, 1929, above referred to, a true copy of which is attached hereto and made a part hereof and marked Exhibit A, was mailed to the petitioner by the respondent on March 8, 1929.

(c) The tax in controversy is gift tax for the calendar year 1925, in the amount of $2,465,681.20, all of which is in dispute.

5 (d) The respondent's determination that a deficiency in gift tax for the year 1925 is due from petitioner is erroneous in the following particulars:

(1) No deficiency in gift tax can be lawfully asserted because section 319 of the revenue act of 1924, as amended, is invalid under section 9 of Article I of the Constitution of the United States in that it is a direct tax levied without apportionment according to population, and is also invalid under the fifth amendment to the Constitution in that the classification made is arbitrary and the graduated rates result in a deprivation of property without due process of law.

(2) Even if section 319 of the revenue act of 1924, as amended, is constitutional (which is denied), the respondent erred in holding that the petitioner made any transfer by gift of any property within the calendar year 1925 by terminating in that year his power to revoke trusts created by him in 1917.

(3) Even if section 319 of the revenue act of 1924, as amended, could properly be construed as imposing a tax upon the termination of the power to revoke a trust created after its enactment (which is denied), the respondent erred in applying the statute so as to impose

a tax upon the termination by petitioner in 1925 of power to
6 revoke trusts created by him in 1917, before the enactment of the statute.

(4) The respondent erred in holding that petitioner made a taxable transfer by gift in 1925 of the accrued income of certain trusts amounting to $116,548.72 for the reasons stated in the first three assignments of error and for the further reason that petitioner had no power to revoke with respect to such income, and no such power with respect to such accrued income was terminated by him in 1925.

(e) The facts upon which the petitioner relies as the basis for this proceeding are as follows:

(1) Petitioner's name was originally "Morris" Guggenheim. Some years ago petitioner adopted the name "Murry" Guggenheim, and that is the petitioner's correct name. Petitioner is the Murry Guggenheim to whom was addressed the deficiency letter attached hereto as Exhibit A. Petitioner is the Morris Guggenheim who in 1917 created certain trusts for the benefit of Edmond A. Guggenheim and Lucille G. Gimbel, referred to below.

(2) On June 28, 1927, petitioner, under the name of Morris Guggenheim, pursuant to an agreement made and executed in Jersey City, New Jersey, created a trust fund primarily for the benefit of his son, Edmond A. Guggenheim, and on June 28, 1917, conveyed, assigned, transferred, set over, and delivered to Commercial
7 Trust Company of New Jersey, corporate trustee, and Clarence L. Myers, individual trustee, in said city of Jersey City, New Jersey, all of the securities constituting the principal or corpus of such trust fund. Said trustees then acquired and have since continuously held title to and possession of the corpus of this trust, have received the income thereon, and have paid over such income to, or accumulated it for the benefit of, the beneficiaries of the trust.

(3) On June 28, 1917, petitioner, under name of Morris Guggenheim, pursuant to an agreement made and executed in Jersey City, New Jersey, created a trust fund primarily for the benefit of his daughter, Lucile G. Gimbel, and on June 28, 1917, conveyed, assigned, transferred, set over, and delivered to Commercial Trust Company of New Jersey, corporate trustee, and Clarence L. Myers, individual trustee, in said city of Jersey City, New Jersey, all of the securities constituting the principal or corpus of said trust fund. Said trustees then acquired and have since continuously held title to and possession of the corpus of this trust, have received the income thereon, and have paid over such income to, or accumulated it for the benefit of, the beneficiaries of the trust.

(4) On or about April 1, 1918, petitioner made and executed in Jersey City, New Jersey, a trust agreement, dated as of June 28, 1917, between himself, under the name of Morris Guggenheim, settler, and Commercial Trust Company of New Jersey, cor-
8 porate trustee, and Clarence L. Myers, individual trustee, primarily for the benefit of his son, Edmond A. Guggenheim,

such trust agreement having been made in substitution for the trust agreement mentioned in paragraph (2), supra. Such trust agreement is hereinafter referred to as the original Edmond A. Guggenheim trust agreement. Under such trust agreement as amended from time to time, the said trustees have continued to hold title to and possession of the corpus of the trust acquired by them on June 28, 1917, to receive the income thereon, and have paid over such income to, or accumulated it for the benefit of, the beneficiaries of said trust.

(5) On or about April 1, 1918, petitioner made and executed in Jersey City, New Jersey, a trust agreement, dated as of June 28, 1917, between himself, under the name of Morris Guggenheim, settler, and Commercial Trust Company of New Jersey, corporate trustee, and Clarence L. Myers, individual trustee, primarily for the benefit of his daughter, Lucile G. Gimbel, such trust agreement having been made in substitution for the trust agreement mentioned in paragraph (3), supra. Such trust agreement is hereinafter referred to as the original Lucile G. Gimbel trust agreement. Under such trust agreement, as amended from time to time, the said trustees have continued to hold title to and possession of the corpus of said trust acquired by them on June 28, 1917, to receive the income thereon, and have paid over such income to, or accumulated it for, the benefit of the beneficiaries of said trust.

(6) The original Edmond A. Guggenheim trust agreement
9 and the original Lucile G. Gimbel trust agreement, respectively, contained the following as the eleventh article thereof:

"Eleventh. Anything herein to the contrary notwithstanding, the settler may, from time to time during the continuance of the trust, by instrument in writing executed and acknowledged in the manner required for a deed of real property, so as to enable it to be recorded in the State of New Jersey, and delivered to the trustees, or their successors, modify or alter in any way or revoke in whole or in part this agreement and the trust then existing, and the estate and interests in property hereby created and provided for, and in case of such modification, alteration, or revocation said instrument shall direct the disposition to be made of the trust fund, or of the part of the trust fund affected by such modification, alteration, or revocation, and upon delivery of such instrument to the trustees, or their successors, said instrument shall take effect according to its provisions, and the trustees, or their successors, shall make, execute, and deliver all such documents, and make such conveyances, transfers, and deliveries of property, rights, interests, and securities as may be necessary or proper in order to carry the same into effect, and no one shall have any right, interest, or estate under this agreement, except subject to and in accordance with such modifications, alteration, or revo-
10 cation thereof; provided, however, that no power of revocation in this agreement reserved or contained shall affect the income at any time received or accrued upon the trust fund, or upon the properties, interests, or securities originally or at any time comprised therein, or affect any accumulations or investments of such

income; but the legal ownership and title of the trustees and the beneficial ownership and title of the beneficiary, or beneficiaries, in and to such income shall be and remain absolute and indefeasible, subject only to such directions as the settler may give to the trustees under the powers herein reserved or contained, as to the respective proportions of income to be paid over or accumulated, or as to the investment or reinvestment of accumulations or varying the respective shares of the beneficiaries in the income to be paid over or accumulated."

(7) The petitioner has at no time exercised the power to revoke the trusts conferred by the eleventh article of said original trust agreements. The petitioner, by instruments dated May 12, 1920, March 3, 1921, and (in respect of the original Edmond A. Guggenheim trust agreement) November 16, 1923, exercised the power conferred by the aforesaid article to alter or amend said trust agreements, but has at no time exercised such power in such a manner as to apply any of the trust property or income to his own benefit.

(8) On May 5, 1921, the petitioner made and executed an
11 instrument wherein he relinquished and divested himself of all powers reserved or retained by him in the original Edmond A. Guggenheim trust agreement of directing and controlling the administration and management of the trust fund held under said trust agreement, and granted, bargained, sold, assigned, and transferred such powers of control and management to Louis F. Rothschild and Clarence L. Myers, and since May 5, 1921, such powers have not been vested in or exercised by petitioner.

(9) On May 5, 1921, the petitioner made and executed an instrument wherein he relinquished and divested himself of all powers reserved or retained by him in the original Lucile G. Gimbel trust agreement of directing and controlling the administration and management of the trust fund held under said trust agreement, and granted, bargained, sold, assigned, and transferred such powers of control and management to Louis F. Rothschild and Clarence L. Myers, and since May 5, 1921, such powers have not been vested in or exercised by petitioner.

(10) On July 13, 1925, the petitioner made and executed an instrument wherein he modified the original Edmond A. Guggenheim trust agreement, as amended, "by eliminating therefrom and cancelling the 'eleventh' article or subdivision thereof."

(11) On July 13, 1925, the petitioner made and executed an instrument wherein he modified the original Lucile G. Gimbel trust
12 agreement, as amended, "by eliminating therefrom and cancelling the 'eleventh' article or subdivision thereof."

(12) On March 15, 1926, petitioner mailed to the collector of Internal revenue for the second district of New York his gift-tax return for the calendar year 1925.

(13) Under date of January 28, 1929, R. M. Estes, Deputy Commissioner of Internal Revenue, addressed to the petitioner a notice stating that a deficiency in the petitioner's gift tax for 1925 had been tentatively determined as follows:

Gross gifts, herein tentatively determined	$13,278,418.99
Deductions tentatively allowed	140,600.00
Net amount of taxable gifts herein tentatively determined	$13,137,818.99
On taxable gifts, in the net amount tentatively determined, the tax is	$2,465,954.75
The amount of tax shown by the return (and paid) is	273.55
Accordingly, a deficiency is tentatively determined in the amount of	$2,465,681.20

The return has been verified as filed except as to the following changes:

13 Gross gifts, Schedule A	Returned	Tentatively determined
Principal of revocable trust in favor of daughter, Lucile G. Gimble, created June 28, 1917 (as amended), which right to revoke was surrendered by donor in agreement of July 13, 1925. Corpus account per sheet A accompanying letter to Commissioner of Internal Revenue dated June 7, 1927.		
Item 1	0.00	$468,600.00
Item 2	0.00	606,283.75
Item 3	0.00	232,925.00
Item 4	0.00	34,375.00
Item 5	0.00	143,680.00
Item 6	0.00	1,389,975.00
Item 7	0.00	396,831.88
Item 8	0.00	563,501.88
Item 9	0.00	474,513.75
Item 10	0.00	151,126.88
Item 11	0.00	106,000.00
Item 12	0.00	111,615.00
Item 13	0.00	354,387.23
Item 14	0.00	58,000.00
Item 15	0.00	629,694.08
Item 16	0.00	287,426.25
Item 17	0.00	65,312.94
Item 18	0.00	329,172.04
Item 19	0.00	55,000.00
Item 20	0.00	254,375.00
Item 21	0.00	30,678.30
Item 22	0.00	796.58
Accrued income	0.00	61,644.63

14 Gross gifts, Schedule A	Returned	Tentatively determined
Principal of revocable trust in favor of son, Edmond. A. Guggenheim, created June 28, 1917 (as amended), which right to revoke was surrendered by donor in agreement of July 13, 1925. Corpus account per sheet C accompanying letter to Commissioner of Internal Revenue dated June 7, 1927.		
Item 1	0.00	$310,181.25
Item 2	0.00	135,037.50
Item 3	0.00	232,925.00
Item 4	0.00	150,500.00
Item 5	0.00	34,375.00
Item 6	0.00	130,771.25
Item 7	0.00	862,000.00
Item 8	0.00	395,824.69
Item 9	0.00	$563,503.13
Item 10	0.00	475,546.88
Item 11	0.00	150,125.00
Item 12	0.00	106,000.00
Item 13	0.00	111,615.00
Item 14	0.00	279,327.52
Item 15	0.00	58,000.00
Item 16	0.00	629,694.08
Item 17	0.00	382,294.00
Item 18	0.00	287,426.25
Item 19	0.00	205,000.00
Item 20	0.00	127,321.47
Item 21	0.00	64,308.13
15 Item 22	0.00	329,166.71
Item 23	0.00	55,000.00
Item 24	0.00	152,625.00
Item 25	0.00	29,730.29
Item 26	0.00	436.01
Accrued income	0.00	54,904.09
To balance... 13,110,463.44		

The amounts stated in Schedule A of said letter as "accrued income" correctly reflect the amounts of accrued interest and dividends as of July 13, 1925, not then received by the trustees and not reflected in the current quotations of the securities comprising said trust funds. The balance of the figures in said Schedule A correctly reflect the fair market value on July 13, 1925, of the securities comprising said trust funds.

(14) Under date of March 8, 1929, the respondent mailed to the petitioner a notice finally determining a deficiency in gift tax for the year 1925 of $2,465,681.20, the same amount as was tentatively determined in said letter of January 29, 1929. A copy of such notice of deficiency dated March 8, 1929, is attached hereto and made a part hereof and marked "Exhibit A."

Wherefore the petitioner prays that this board may hear the proceeding and determine:

First. That there was no deficiency in petitioner's gift tax for the year 1925, for the reason that section 319 of the revenue act of
16 1924, as amended, is invalid under section 9 of Article I of the Constitution of the United States in that it imposes a direct tax levied without apportionment according to population, and is also invalid under the fifth amendment to the Constitution in that the classification made is arbitrary and the graduated rates result in a deprivation of property without due process of law.

Second. That there was no deficiency in petitioner's gift tax for the year 1925, for the reason that the petitioner did not, by terminating in that year his power to revoke trusts established by him in 1917, make a transfer by gift of any property within the meaning of the gift tax law.

Third. That there was no deficiency in petitioner's gift tax for the year 1925 for the reason that section 319 of the revenue act of 1924, as amended, imposes no tax upon the termination of power to revoke trusts created prior to the enactment of the said act.

Fourth. That in any event the deficiency asserted by respondent should be reduced by eliminating from the amount subject to gift tax the items aggregating $116,548.72, representing the income accrued on the trusts on July 13, 1925, because no power to revoke with respect to such income existed or was terminated in 1925.

ARTHUR A. BALLANTINE,
GEORGE E. CLEARY,
Counsel for the Petitioner.

Office and post-office address, 31 Nassau Street, New York, N. Y.

17 [*Duly sworn to by Murry Guggenheim; jurat omitted in printing.*]

18 *Exhibit A to petition*

Office of Commissioner of Internal Revenue.
Address reply to Commissioner of Internal Revenue and refer to MT-ET-GT-C1-68-JEK.
District of 2d New York.
Gifts made by Murry Guggenheim.
Calendar year 1925.
Deficiency tax, $2,465,681.20.

MURRY GUGGENHEIM,
120 Broadway, New York, New York.

SIR: The Bureau has examined the protest filed on behalf of the above-named donor against the tentative findings set forth in the letter addressed to him by this office under date of January 28, 1929. The deficiency hereby determined amounts to $2,465,681.20, and is fully explained in the attached statement, consisting of one page, showing the action of the bureau with respect to the protest.

In accordance with the provisions of Title III of the revenue act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said
19 board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the collector of internal revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 298, waiving (1) your right to file a petition with the United State Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the estate tax division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

D. H. BLAIR. (Sgd.)
Commissioner.

Enclosures: Statement, waiver form 298.
CLE.

20 MT-ET-GT-Cl-68-JEK—2d New York.
Gifts made by Murry Guggenheim.

The protest arises in connection with the following items:

Gross gifts

Schedule A	Returned	Tentatively determined	Determined
Principal and income of trust, Lucile G. Gimble, beneficiary	0.00	6,805,915.19	6,805,915.19
Principal and income of trust, Edmond A. Guggenheim, beneficiary	0.00	6,304,548.25	6,304,548.25

No evidence has been presented in connection with the protest which warrants any change in the action of the bureau in taxing as gifts the value of the trusts created by the donor for the benefit of his son and daughter. Accordingly, the following computation shows the gift tax liability of the above-named donor:

Gross gifts	167,955.55	13,278,418.99	13,278,418.99
Deductions	140,600.00	140,600.00	140,600.00
Tax liability	27,355.55	13,137,818.99	13,137,818.99
Deficiency	273.55	2,465,954.75	2,465,954.75
		2,465,681.20	2,465,681.20

The deficiency bears interest at the rate of six per centum per annum from March 15, 1926, to the date of assessment or to the thirtieth day after the filing of a waiver of the restrictions on the assessments, whichever the earlier.

21 Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed June 17, 1929

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

(a), (b), (c). Admits the allegations in paragraphs (a), (b), and (c).

(e), 1. Admits the allegations in paragraph (e) 1.

(e) 2 to 11, inclusive. For lack of information upon which to base a belief, denies the allegations in paragraphs (e) 2 to 11, inclusive.

(e) 12. Admits the existence of what purports to be a gift-tax return of the petitioner, Murry Guggenheim, for the calendar
22 year 1925, which bears the stamp "Received March 15, 1926, second district, New York, collector of internal revenue." Denies the remaining allegations in paragraph (e) 12.

(e) 13. Admits that the letter dated January 28, 1929, over the signature of R. M. Estes, deputy commissioner, containing an itemized statement of the amounts alleged in paragraph (e) 13, was addressed to the petitioner. Denies the remaining allegations in paragraph (e) 13.

(e) 14. Admits the allegations in paragraph (e) 14.

Denies generally and specifically each and every allegation in taxpayer's petition, not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the petition be denied.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney, Bureau of Internal Revenue.

jdf/6/17/29.

23 Before United States Board of Tax Appeals

Docket No. 43698

MURRY GUGGENHEIM, PETITIONER

against

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Stipulation of facts

Filed at hearing Nov. 5, 1930

It is hereby stipulated and agreed between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein to be stipulated as true.

1. Petitioner is an individual, who at all times has been a citizen and resident of the United States. During the years 1917 to 1925, inclusive, the petitioner resided at 998 Fifth Avenue, New York, New York, and had his place of business at 120 Broadway, New York, New York.

2. On March 8, 1929, the respondent mailed to the petitioner, at 120 Broadway, New York, New York, a notice of deficiency
24 finding a deficiency in gift tax for the calendar year 1925 of $2,465,681.20. A true copy of said notice of deficiency is attached to the petition herein as Exhibit A thereof. On April 16, 1929, the petitioner filed with the United States Board of Tax Appeals a petition for a redetermination of said deficiency, and

paid the filing fee of $10 required in connection therewith. The entire amount of the alleged deficiency is in controversy.

3. On January 28, 1929, the respondent mailed to the petitioner a letter showing his tentative determination of the deficiency in gift tax for the calendar year 1925. A true copy of said letter is attached hereto, and marked "Exhibit No. 1."

4. Petitioner's name was originally Morris Guggenheim. Prior to 1925 petitioner adopted the name Murry Guggenheim, and that is the petitioner's correct name. Petitioner is the Murry Guggenheim to whom was addressed the notice of deficiency mailed March 8, 1929. Petitioner is the Morris Guggenheim who, on June 28, 1917, executed two certain trust agreements, primarily for the benefit of Edmond A. Guggenheim and Lucile G. Gimbel, respectively, and thereafter executed the amendments to said trust agreements referred to below.

5. On June 28, 1917, the petitioner as settlor, the Commercial Trust Company of New Jersey as corporate trustee, and Clarence L. Myers as individual trustee made and executed, in Jersey City, New Jersey, a trust agreement for the benefit of certain persons, including Edmond A. Guggenheim, the son of the petitioner. On April 1, 1918, the petitioner as settlor, the Commercial Trust Company of New Jersey as corporate trustee, and Clarence L. Myers as individual trustee made and executed, as of June 28, 1917, in complete substitution for said trust agreement of June 28, 1917, a trust agreement, a true copy of which is attached hereto and marked "Exhibit No. 2." Said trust agreement, as amended and modified from time to time, is hereinafter referred to as the "Edmond A. Guggenheim trust."

6. On May 12, 1920, said Edmond A. Guggenheim trust was modified and amended by an instrument executed by petitioner, said Commercial Trust Company of New Jersey, and said Clarence L. Myers, a copy of which is attached hereto and marked "Exhibit No. 3."

7. On March 2, 1921, Clarence L. Myers tendered his resignation as individual trustee under said Edmond A. Guggenheim trust, and sold, transferred, assigned, and delivered to Commercial Trust Company of New Jersey, as trustee of said Edmond A. Guggenheim trust, all of his right, title, and interest in said trust, and the properties and securities comprising the same. A true copy of said letter of resignation is attached hereto and marked "Exhibit No. 4." A true copy of the instrument evidencing said transfer is attached hereto and marked "Exhibit No. 5." said Commercial Trust Company of New Jersey, as trustee, accepted said resignation by, and transfer by, Clarence L. Myers, by a letter dated March 2, 1921, a true copy of which is attached hereto and marked "Exhibit No. 6." The petitioner, by letter of March 2, 1921, to said Commercial Trust Company of New Jersey, directed that, in view of the resignation of the individual trustee, an individual trustee, should be dispensed with in the performance of the

trust. A copy of said letter is attached hereto and marked "Exhibit No. 7."

8. On March 3, 1921, said Edmond A. Guggenheim trust was amended and modified by an instrument executed by petitioner and Commercial Trust Company of New Jersey, a copy of which is attached hereto and marked "Exhibit No. 8."

9. On May 5, 1921, said Edmond A. Guggenheim trust was amended and modified by an instrument executed by petitioner, Commercial Trust Company of New Jersey, Louis F. Rothschild, and Clarence L. Myers, a true copy of which is attached hereto and marked "Exhibit No. 9."

10. On November 16, 1923, said Edmond A. Guggenheim trust was amended and modified by an instrument executed by petitioner and Commercial Trust Company of New Jersey, a true copy of which is attached hereto and marked "Exhibit No. 10."

27 Said instrument of November 16, 1923, created out of the securities held in the Edmond A. Guggenheim trust a separate trust fund, hereinafter referred to as the "Edmond A. Guggenheim special fund." Since November 16, 1923, there has been no amendment, modification, or change in the trust provisions as to the Edmond A. Guggenheim special fund, and said Edmond A. Guggenheim special fund has been held as a separate trust fund by Commercial Trust Company of New Jersey as trustee. Neither the securities composing said Edmond A. Guggenheim special fund nor the accrued income thereof has been included by respondent in his computation of the amount of petitioner's net taxable gifts.

11. On June 23, 1925, Clarence L. Myers, and on June 26, 1925, Louis F. Rothschild, respectively, stated in writing their desire to relinquish the rights conferred upon them by the instrument of May 5 (Exhibit No. 9), and consented to the vesting of such rights in other persons. Copies of these written statements and consents are attached hereto and marked "Exhibits Nos. 11 and 12," respectively.

12. On July 13, 1925, said Edmond A. Guggenheim trust was modified and amended by an instrument executed by petitioner, Commercial Trust Company of New Jersey, S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, a true copy of which is attached hereto and marked "Exhibit No. 13."

13. Thereafter, on July 13, 1925, said Edmond A. Guggen-
28 heim trust was further amended and modified by an instrument executed by petitioner and Commercial Trust Company of New Jersey, a true copy of which is attached hereto and marked "Exhibit No. 14."

14. The foregoing exhibits, numbered 2 to 14, inclusive, constitute all the modifications and changes in the Edmond A. Guggenheim trust.

15. On June 28, 1917, the petitioner as settlor, the Commercial Trust Company of New Jersey as corporate trustee, and Clarence L. Myers as individual trustee made and executed in Jersey City, New

Jersey, a trust agreement for the benefit of certain persons including Lucile G. Gimbel, the daughter of the petitioner. On April 1, 1918, the petitioner as settlor, the Commercial Trust Company of New Jersey as corporate trustee, and Clarence L. Myers as individual trustee made and executed, as of June 28, 1917, in complete substitution for said trust agreement of June 28, 1917, a trust agreement, a true copy of which is attached hereto and marked "Exhibit No. 15." Said trust agreement, as amended and modified from time to time, is hereinafter referred to as the "Lucile G. Gimbel trust."

16. On May 12, 1920, said Lucile G. Gimbel trust was modified and amended by an instrument executed by petitioner, said Commercial Trust Company of New Jersey, and said Clarence L. Myers, a copy of which is attached hereto and marked "Exhibit No. 16."

29 17. On March 2, 1921, Clarence L. Myers tendered his resignation as individual trustee under said Lucile G. Gimbel trust, and sold, transferred, assigned, and delivered to Commercial Trust Company of New Jersey, as trustees of said Lucile G. Gimbel trust, all of his right, title, and interest in said trust, and the properties and securities comprising the same. A true copy of said letter of resignation is attached hereto and marked "Exhibit No. 17." A true copy of the instrument evidencing said transfer is attached hereto and marked "Exhibit No. 18." Said Commercial Trust Company of New Jersey as trustee accepted said resignation by, and transfer by, Clarence L. Myers, by a letter dated March 2, 1921, a true copy of which is attached hereto and marked "Exhibit No. 19." The petitioner, by letter of March 2, 1921, to said Commercial Trust Company of New Jersey directed that, in view of the resignation of the individual trustee, an individual trustee should be dispensed with in the performance of the trust. A copy of said letter is attached hereto and marked "Exhibit No. 20."

18. On March 3, 1921, said Lucile G. Gimbel trust was amended and modified by an instrument executed by petitioner and Commercial Trust Company of New Jersey, a copy of which is attached hereto and marked "Exhibit No. 21."

19. On May 5, 1921, said Lucile G. Gimbel trust was amended and modified by an instrument executed by petitioner, Commercial
30 Trust Company of New Jersey, Louis F. Rothschild, and Clarence L. Myers, a true copy of which is attached hereto and marked "Exhibit No. 22."

20. On June 23, 1925, Clarence L. Myers, and on June 26, 1925, Louis F. Rothschild, respectively, stated in writing their desire to relinquish the rights conferred upon them by the instrument of May 5, 1921 (Exhibit No. 22), and consented to the vesting of such rights in other persons. Copies of these written statements and consents are attached hereto and marked "Exhibits Nos. 23 and 24," respectively.

21. On July 13, 1925, said Lucile G. Gimbel trust was modified and amended by an instrument executed by petitioner, Commercial Trust Company of New Jersey, and S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, a true copy of which is attached hereto and marked "Exhibit No. 25."

22. Thereafter, on July 13, 1925, said Lucile G. Gimbel trust was further amended and modified by an instrument executed by petitioner and Commercial Trust Company of New Jersey, a true copy of which is attached hereto and marked "Exhibit No. 26."

23. The foregoing exhibits, numbered 15 to 26, inclusive, constitute all the modifications and changes in the Lucile G. Gimbel trust.

24. The copies attached hereto as Exhibits Nos. 1 to 26, in-
31 clusive, are true copies of the originals thereof, and may be accepted by the board as evidence in this case in lieu of the originals.

25. On June 28, 1917, petitioner delivered to Commercial Trust Company of New Jersey as corporate trustee, and Clarence L. Myers as individual trustee, the securities constituting the principal or corpus of the Edmond A. Guggenheim trust, to be held in trust as provided in said trust agreement. Such securities were delivered to Commercial Trust Company of New Jersey on June 28, 1917, at Jersey City, New Jersey. At all times since June 28, 1917, said trustees, the Commercial Trust Company of New Jersey acting alone after the resignation of the individual trustee on March 2, 1921, have continued to hold the physical possession of the entire corpus of said Edmond A. Guggenheim trust, have had the securities of said trust registered or recorded in the name of the trustees or trustee, or of a nominee for the trustees or trustee, have collected and received the entire rents, issues, interest, income, and profits of the Edmond A. Guggenheim trust, and, as provided in said trust agreement, have distributed part of said income to Edmond A. Guggenheim, and have accumulated the balance. At no time since June 28, 1917, has any part of the income of said Edmond A. Guggenheim trust been paid to, or transferred to, the petitioner, or expended for his account or benefit. In 1917 and 1918 the petitioner withdrew certain securities from the trust fund and substituted other
32 securities of equal or greater value therefor, but no such substitution of securities was made subsequent to 1918, and, except as herein stated, no part of the corpus of said Edmond A. Guggenheim trust has been paid or transferred to the petitioner, or expended for his account or benefit.

26. On June 28, 1917, petitioner delivered to Commercial Trust Company of New Jersey as corporate trustee, and Clarence L. Myers as individual trustee, all of the securities constituting the principal or corpus of the Lucile G. Gimbel trust, to be held in trust as provided in said trust agreement. Said securities were delivered to Commercial Trust Company of New Jersey on June

28, 1917, at Jersey City, New Jersey. At all times since June 28, 1917, said trustees, the Commercial Trust Company of New Jersey acting alone after the resignation of the individual trustee on March 2, 1921, have continued to hold the physical possession of the entire corpus of said Lucile G. Gimbel trust, have had the securities of said trust registered or recorded in the name of the trustees or trustee, or of a nominee for the trustees or trustee, have collected and received the entire rents, issues, interest, income, and profits of the said Lucile G. Gimbel, trust, and, as provided in said trust agreement, have distributed part of such income to Lucile G. Gimbel and have accumulated the balance of said income. At
33 no time since June 28, 1917, has any part of the income of said Lucile G. Gimbel trust been paid or transferred to the petitioner, or expended for his benefit or account. In 1917 and 1918 the petitioner withdrew certain securities from the trust fund and substituted other securities of equal or greater value therefor, but no such substitution of securities was made subsequent to 1918, and, except as herein stated, no part of the corpus of the Lucile G. Gimbel trust has been paid to or transferred to the petitioner or expended for his account.

27. Upon the creation, on June 28, 1917, of the Edmond A. Guggenheim trust and the Lucile G. Gimbel trust, and the delivery by the petitioner to the trustees of the securities comprising said trusts which had theretofore been owned by the petitioner, all such securities were charged off the books of petitioner and wholly eliminated from his accounts as assets. The petitioner has not at any time negotiated any loan or secured any credit on the basis of the properties held in the Edmond A. Guggenheim trust or the Lucile G. Gimbel trust, or of his powers under said trust agreements. None of such securities have been registered or recorded in the name of the petitioner or of any nominee of the petitioner since such securities were originally delivered to the trustees of said trusts. The value of the remaining properties owned by the petitioner after the creation, on June 28, 1917, of the Edmond A. Guggenheim trust and the Lucile G. Gimbel trust, has at all times exceeded, in substantial amount, the value of the securities delivered by the petitioner to the trustees on account of said trusts.

34 28. From and after May 5, 1921, the petitioner did not exercise any of the rights or powers of management and control of the trust funds originally reserved to or retained by him by virtue of the fifth and seventh articles of the Edmond A. Guggenheim trust and the Lucile G. Gimbel trust, which powers were relinquished by the petitioner and vested in Louis F. Rothschild and Clarance L. Myers by the instruments of May 5, 1921 (Exhibits Nos. 9 and 22). In so far as any of such powers were exercised after May 5, 1921, by any person other than Commercial Trust Com-

pany of New Jersey, as trustee, they were exercised by Louis F. Rothschild until July 13, 1925, and thereafter by the persons named for that purpose in the amending instruments of July 13, 1925 (Exhibits Nos. 13 and 25).

29. Commercial Trust Company of New Jersey, a corporation organized under the laws of the State of New Jersey, during the years 1917 to 1925 and thereafter, carried on a large and extensive trust-company business. The petitioner at no time has had any financial interest in Commercial Trust Company of New Jersey.

30. During all of the calendar year 1925 the petitioner, his wife, Leonie Guggenheim, his son, Edmond A. Guggenheim, and his daughter, Lucile G. Gimbel, were living. Lucile G. Gimbel and Edmond A. Guggenheim were the only children of petitioner living during the year 1917 or subsequent thereto. The petitioner was born August 12, 1858; Leonie Guggenheim, the wife of the petitioner, was born December 28, 1865; Edmond A. Guggenheim was born January 19, 1888; Lucile G. Gimbel was born April 27, 1894. Prior to June 28, 1917, the petitioner had not made any settlement or created any trust for the benefit of his son, Edmond A. Guggenheim, or his daughter, Lucile G. Gimbel.

35

31. During the year 1917 the petitioner was a partner in the firm of Guggenheim Brothers, was enjoying good health, and was actively engaged in large financial and business enterprises. He has continued as an active member of the firm of Guggenheim Brothers until the present time.

32. On July 13, 1925, the fair market value of the securities constituting the corpus account in the Edmond A. Guggenheim trust was $6,304,548.25, this amount including $61,644.63, representing interest accrued on bonds but not yet received, and dividends declared on stocks but not yet received and not reflected in the market quotations of the bonds and stocks comprising said corpus account.

33. On July 13, 1925, the fair market value of the securities constituting the corpus account of the Lucile G. Gimbel trust was $6,805,915.19, this amount including $54,904.09, representing interest accrued on bonds but not yet received, and dividends declared on stocks but not yet received, and not reflected in the market quotations of the bonds and stocks constituting said corpus account.

36

34. It is stipulated and agreed that the petitioner made no gift in 1925 of the item of $61,644.63, representing accrued income of the Edmond A. Guggenheim trust, or the item of $54,904.09, representing accrued income of the Lucile G. Gimbel trust; that the petitioner reserved no power to revest title in himself to such accrued income and that no such power with respect to such accrued income was terminated in 1925. It is stipulated and agreed that respondent's determination that petitioner made net taxable gifts of $13,137,818.99 in 1925 should be modified by deducting from said amount the sum of $116,548.72, representing said items of accrued income.

35. On March 15, 1926, the petitioner filed with the collector of internal revenue for the second district of New York a gift-tax return for the calendar year 1925. It is stipulated and agreed that a photostatic copy of said return, the original of which is in the possession of the respondent, shall be introduced in evidence.

Dated, June 20, 1930.

ARTHUR A. BALLANTINE,
Counsel for Petitioner.
C. M. CHAREST,
Counsel for Respondent.

37 *Edmond A. Guggenheim trust, Exhibit No. 1*

O. F. #300-A.

CC—Mr. Arthur A. Ballantine, atty., 31 Nassau Street, New York, N. Y.

JAN. 28, 1929.

MT-ET-GT-68-WLC.
District of second New York.
Gifts made by Murry Guggenheim.
Calendar year 1925.
Tentative deficiency tax, $2,465,681.20.

MURRY GUGGENHEIM, *Donor,*
120 Broadway, New York, New York.

SIR: An audit and review of your return on Form 706A for the calendar year 1925 in connection with the supplemental data, submitted by you or obtained upon investigation, have resulted in a tentative determination of a deficiency in the tax amounting to $2,465,681.20, as hereinafter explained.

If you acquiesce in whole or in part in the tentatively determined deficiency, as disclosed in this letter, you are requested to sign the enclosed agreement consenting to the assessment of so much of the deficiency as results from the findings in which you acquiesce and to forward it to the Commissioner of Internal Revenue, Washington,
D. C., marked for the attention of estate tax division, Mis-
38 cellaneous Tax Unit. The assessment thereof will stop the running of interest on the amount assessed until notice and demand for payment by the collector. Until receipt of such notice and demand, no payment should be made with respect to the deficiency.

If you desire to protest these tentative findings, in whole or in part, such protest in writing must be filed in this office within 30 days from the date of this letter. If a protest is presented, it may be accompanied by such brief, or argument, as you may care to offer, and must be supported by all the evidence relied upon. The evidence should be in the form of affidavits, original documents, or certified or verified copies thereof, or other competent evidence. If

a protest is presented, careful consideration will be given to it before the tax liability is finally determined.

An oral hearing is not a prerequisite to the consideration of a protest. If, however, you desire to be accorded a hearing in the bureau, request therefor must be made within 30 days from the date of this communication and, should you desire that the hearing be set for any particular date, your request should so state, and the date suggested by you will be reserved, if possible. All oral hearings relative to these tentative findings will be held only in Washington, D. C. A request for an informal hearing should contain (a) the name of the donor; (b) a reference to the date and symbols appearing on this communication; (c) an itemized schedule of the findings of the bureau to which exception is taken; and (d) a summary statement of the ground relied upon in connection with each exception.

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Should you not appear in person at the hearing, your attention is directed to the rule that a duly executed power of attorney must be filed by anyone desiring to be recognized by the department as agent or attorney in any respect. In general, anyone filing a power of attorney must be authorized to practice before the Treasury Department. (See Treasury Department Circular #230, as supplemented, copies of which may be obtained upon application to the secretary of the committee on enrollment and disbarment, Treasury Department, Washington, D. C.)

If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the bureau, you will, in accordance with the provisions of Title III of the revenue act of 1926, be notified by registered mail of the final determination by the commissioner of the amount of the deficiency, and in the event you do not acquiesce in such final determination, you may within 60 days from the mailing of the letter file a petition with the Board of Tax Appeals. Such portion, if any, of the deficiency tax as may be ultimately sustained will be assessed, together with interest thereon at the rate of 6 per centum per annum from the due date to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier. Such portion of the amount so assessed as is not paid within 30 days from the date of notice and demand for payment by the collector bears interest at the rate of 1 per centum a month from the date of notice and demand until payment is received by the collector unless, however, the commissioner has granted an extension of time for paying the amount assessed, or a part thereof. Where an extension is granted, interest attaches at the rate of 6 per centum per annum to the amount, the time for payment of which is extended, for the period of the extension only, regardless of the date of payment. (For rules and illustrations relating to interest, see article 43, Regulations 67, 1924 edition.)

40

The following itemization shows the tentative findings of the bureau in accordance with the gift-tax law:

Gross gifts, herein tentatively determined	$13,278,418.99
Deductions tentatively allowed	140,600.00
Net amount of taxable gifts herein tentatively determined	13,137,818.99
On taxable gifts, in the net amount tentatively determined, the tax is	2,465,954.75
The amount of tax shown by the return (and paid) is	273.55
Accordingly, a deficiency is tentatively determined in the amount of	2,465,681.20

The return has been verified as filed except as to the following changes:

41 Gross gifts, Schedule A	Returned	Tentatively determined
Principal of revocable trust in favor of daughter, Lucile G. Gimble, created June 28, 1917 (as amended), which right to revoke was surrendered by donor in agreement of July 13, 1925. Corpus account per sheet A, accompanying letter to Commissioner of Internal Revenue dated June 7, 1927.		
Item 1	0.00	$468,600.00
Item 2	0.00	606,283.75
Item 3	0.00	232,925.00
Item 4	0.00	$34,375.00
Item 5	0.00	143,680.00
Item 6	0.00	1,389,975.00
Item 7	0.00	396,831.88
Item 8	0.00	563,501.88
Item 9	0.00	474,513.75
Item 10	0.00	151,126.88
Item 11	0.00	106,000.00
Item 12	0.00	111,615.00
Item 13	0.00	354,387.23
Item 14	0.00	58,000.00
Item 15	0.00	629,694.08
Item 16	0.00	287,426.25
Item 17	0.00	65,312.04
Item 18	0.00	329,172.04
Item 19	0.00	55,000.00
Item 20	0.00	254,375.00
Item 21	0.00	30,678.30
Item 22	0.00	796.58
Accrued income	0.00	61,644.63

42 Gross gifts, Schedule A	Returned	Tentatively determined
Principal of revocable trust in favor of son, Edmund A. Guggenheim, created June 28, 1917 (as amended), which right to revoke was surrendered by donor in agreement of July 13, 1925. Corpus account per sheet C accompanying letter to Commissioner of Internal Revenue dated June 7, 1927.		
Item 1	0.00	$310,181.25
Item 2	0.00	135,037.50
Item 3	0.00	232,925.00
Item 4	0.00	150,500.00
Item 5	0.00	34,375.00
Item 6	0.00	130,771.25
Item 7	0.00	862,000.00
Item 8	0.00	395,824.69
Item 9	0.00	$563,503.13
Item 10	0.00	475,546.88
Item 11	0.00	160,125.00
Item 12	0.00	106,000.00
Item 13	0.00	111,615.00
Item 14	0.00	279,327.52
Item 15	0.00	58,000.00
Item 16	0.00	629,694.08
Item 17	0.00	382,204.00
Item 18	0.00	287,426.25
Item 19	0.00	205,000.00
Item 20	0.00	127,321.47
Item 21	0.00	64,308.13
Item 22	0.00	329,166.71
Item 23	0.00	55,000.00
Item 24	0.00	152,625.00
Item 25	0.00	20,730.29
Item 26	0.00	436.01
Accrued income	0.00	54,904.09
To balance.. $13,110,463.44		

This case has been audited in accordance with the retroactive provision of the revenue act of 1926 with respect to rates of tax.

Respectfully,

(Signed) R. M. ESTES,
Deputy Commissioner.

PC.
Agreement.

Edmond A. Guggenheim trust, Exhibit No. 2

TRUST AGREEMENT, made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," party of the first part, and Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having its main office and place of business at number 15 Exchange Place, Jersey
44 City, New Jersey, hereinafter called the "corporate trustee," and Clarence L. Myers, a resident of Red Bank, county of Monmouth, and State of New Jersey, hereinafter called the "individual trustee," the corporate trustee and the individual trustee being hereinafter called the "trustees," parties of the second part.

Whereas, the settlor desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, therefore, this agreement witnesseth:

That, in consideration of the premises, the mutual covenants herein contained and other good and valuable considerations, and of the sum of one dollar ($1.) to him in hand paid by the trustees, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the settlor has given, granted, conveyed, assigned, transferred, set over, and delivered, and by these presents does give, grant, convey, assign, transfer, set over, and deliver unto the trustees, their successors and assigns, the following-described properties, interests, and securities, to wit:

One million three hundred thousand dollars ($1,300,000.) face amount part-paid receipts for subscriptions to Chile Copper Company 6% collateral trust gold bonds, series A, numbered L-224 to L-249, inclusive;

45 Twenty-five hundred (2,500) shares of stock New York and Honduras Rosairo Mining Company;

Three thousand six hundred (3,600) shares stock Sidney Blumenthal & Company, common;

Two thousand seven hundred fifty-four (2,754) shares stock Sidney Blumenthal & Company, preferred;

Five thousand (5,000) shares stock Sidney Blumental & Company, preferred B;

Three thousand and twenty-five (3,025) shares stock Bunker Hill & Sullivan Mining and Concentrating Company;

Four thousand (4,000) shares stock Utah Copper Company;

One hundred thousand (100,000) shares stock Chile Copper Company;

Eighty thousand dollars ($80,000.) par value Braden Copper Mines Company 15-year 6% sinking-fund gold bonds, principal due February 1, 1931;

Five hundred and fifty thousand dollars ($550,000.) par value Chile Copper Company collateral trust 7% 10-year convertible coupon bonds, principal due May 1, 1923;

Together with all the right, title, interest, and estate of the settlor therein or thereto; all of which said properties, interests, and securities hereinafter collectively referred to as the "trust fund" or "original trust fund" have this day been delivered in person by the settlor into the hands of the corporate trustee at its office
46 aforesaid in Jersey City, New Jersey, the receipt whereof by the corporate trustee is hereby acknowledged.

To have and to hold all and singular the above granted and described properties, interests, and securities unto the said trustees, their successors and assigns, in trust for and upon the following uses and purposes and subject to the terms, conditions, powers, and agreements hereinafter set forth:

First. In the manner hereinafter specified, to receive, hold, manage, sell, exchange, invest, reinvest, deal with and dispose of the same and every part thereof, and to collect, recover and receive the rents, issues, interest, income and profits thereof, hereinafter called the "income" thereof; and to pay such income to the extent of thirty thousand dollars ($30,000.) thereof per annum to the son of the settlor, Edmond A. Guggenheim, hereinafter called the "beneficiary," in quarterly installments, payable, respectively, on the first day of January, April, July, and October in each and every year until the expiration of ten (10) years from the date of this instrument, or until the earlier termination of the trust; and to invest the remainder of all such income (less any amount or amounts thereof which the trustees may be required to deduct and withhold therefrom and to pay under any present or future income tax or other law, and after deducting therefrom the commissions of the trustees hereinafter provided for and the proper and necessary expenses of administering the
47 trust) in other property or securities, which shall be when acquired added to the property or securities already held by the trustees hereunder and subject to the same terms and conditions of trust as an integral part of the trust fund. The settlor may at any time, and from time to time, by directions in writing delivered to the trustees, increase the aggregate amount of payments to be made annually to the beneficiary above the yearly rate or sum hereinbefore specified, to any extent not exceeding the full amount of the annual net income of the trust fund; and the settlor may likewise at any time, and from time to time, by directions in writing delivered to the trustees, decrease the aggregate amount of the payments to be made annually to the beneficiary below any amount to which such payments may previously have been increased as herein provided, to any extent down to the amount of such payments first hereinbefore specified.

Second. At the expiration of ten (10) years from the date of this instrument (unless the trust created hereby should be sooner revoked as hereinafter provided) to assign, transfer, convey, pay over, surrender, and deliver the said trust fund, and all the property, money, or securities then comprising the same, together with all income, gains, and profits thereof in the hands of the trustees, to the said

beneficiary, absolutely and free of all restrictions. In the event of the death of the beneficiary prior to the expiration of ten (10) years from the date hereof, the trustee thenceforth until the termination of the trust shall hold, adminster, and apply the trust
48 fund and the income thereof in trust for the use, benefit, and advantage of the child or children of the beneficiary him surviving, as follows: (a) If there be more than one such child so surviving, the trust fund shall be held for the use, benefit, and advantage of all such children alike, and each such child shall have the same beneficial interest in the trust fund and shall be entitled to an equal distributive share of the same; if there be but one such child so surviving, the trust fund shall be held for the use, benefit, and advantage of that child, and he or she shall have the sole beneficial interest in the trust fund and shall be entitled to the whole thereof on distribution; (b) out of the income of the trust fund (less the deductions hereinbefore specified), the trustees shall pay to the guardian or guardians of each such child, if there be more than one, or of the one child, if there be no more, such periodical allowance as in the judgment of such guardian or guardians shall be sufficient and appropriate adequately to provide for the maintenance, care, education, and personal and social needs and requirements of such child, due consideration being given to the position, means, and habit and mode of life of such child until such child shall have arrived at the age of twenty-one (21) years, the balance of such income over and above the amount of such allowance to be invested, reinvested, accumulated, and added to the principal of the trust fund in the manner herein elsewhere specified; (c) when any such child shall have arrived at the age of twenty-one (21) years, if there be more than one
49 such child, the income of the trust fund less the deductions specified shall be equally apportional between all such children, and one full equal portion of such income shall thereafter be paid to the child so arriving at the age of twenty-one (21) years, and the other full equal portions shall be paid to the others of such children, respectively, as and when they severally arrive at the said age, until the expiration of twenty (20) years from the date of the death of the beneficiary, but if there be but one such child, the entire income of the trust fund (less the deductions specified) shall thereafter be paid to that child until the expiration of twenty (20) years from the date of the death of the beneficiary; (d) at the expiration of twenty (20) years from the last mentioned date, the trust fund and all accumulations of income thereon shall be divided into as many equal portions as there were children of the beneficiary surviving him at the time of his death, if there were more than one, and one such equal portion shall be paid over, surrendered, and delivered to each such child then living, but if there were but one such child so surviving, the entire trust fund and all accumulations thereon shall be paid over, surrendered, and delivered to that child if then living; (e) if at any time between the date of the death of the beneficiary and the expiration of

the said twenty (20) years any such child shall die, the trust fund and all accumulations thereon shall nevertheless remain intact and shall not be divided as aforesaid until the expiration of the said twenty (20) years, at which time the portion thereof to which such child would then have been entitled had he or she lived shall be paid
50 over, surrendered, and delievered or otherwise distributed as he or she may have by his or her last will directed, or, if there be no such last will, as the laws of his or her domicile may prescribe in case of intestacy.

In the event of the death of the beneficiary prior to the expiration of ten (10) years from the date hereof leaving no children him surviving, the trust fund and all accumulations thereon shall thereupon be paid over, surrendered, and delivered to the settlor, or in case of his prior decease, to the executors or administrators of his estate.

Third. The settlor hereby expressly reserves to himself the privilege of increasing the principal of the trust fund, from time to time, by adding thereto properties, interests, and securities, which the trustees shall receive, hold, manage, sell, exchange, invest and reinvest, deal with, and dispose of in the same manner as herein specified in respect of the properties, interests, and securities forming the original trust fund.

Fourth. The trust fund created hereby shall comprise the properties, interests, and securities hereinbefore described in their present form, or in any substituted form resulting from the sale or exchange of the same or otherwise, and also such additional or other properties, interests, or securities as may from time to time be added to the trust fund by the settlor, or substituted by the settlor for properties or securities previously comprised in the trust fund, or as may
51 from time to time be acquired by the trustees through investments or reinvestments for the trust fund made in the manner herein provided, of the proceeds of any sales of trust property, or of the income of the trust fund or any part of such income, or of any other monies belonging, appertaining, or devoted to the uses of the trust.

Fifth. Sales, exchanges, and substitutions of property or securities comprising the trust fund, and investments and reinvestments for the trust fund, and of income subject to investment or reinvestment, shall be made if, when and as directed in writing by the settlor, to whom alone is reserved the right of deciding upon and authorizing the making of any and all such changes in the trust fund caused by sales, exchanges and substitutions of property or securities comprising the trust fund and investments and reinvestments of the trust fund and of income subject to investment or reinvestment, and the right of causing such changes to be effectuated; and the trustees shall be fully protected in making any such sales, exchanges, substitutions, investments and reinvestments as shall be directed in writing by the settlor, and shall not be liable or responsible in any way for depreciation or loss incurred by reason of any

such sales, exchanges, substitutions, investments or reinvestments so made. No purchaser upon any sale by the trustees shall be bound to see to the application of purchase money arising therefrom, or to inquire into the authority, validity, expediency or propriety of any such sale.

52 Sixth. The trustees shall, if requested by the settlor in writing so to do, cause the securities which may, from time to time, comprise the trust fund, or any part thereof, to be registered in their names as trustees hereunder, in which case the properties or securities shall stand in the name of "Commercial Trust Company of New Jersey and Clarence L. Myers, trustees under the trust agreement of Morris Guggenheim for Edmond A. Guggenheim, dated the 28th day of June, 1917," or in such other name as the settlor may select.

Seventh. Subject in each and every instance to the written approval and directions of the settlor, the trustees are authorized and empowered to do and perform the following: (1) To vote in person or by proxy upon all stocks or other securities held by it; (2) to exchange the securities of any corporation or company for other securities issued by the same, or by any other corporation or company; (3) to consent to the reorganization, consolidation or merger of any corporation or company, or to consent to the sale or lease of its property, or any portion thereof, to any person, corporation or company, or to the acquisition through purchase or lease from any person, corporation or company of his or its property or any portion thereof, and upon such reorganization, consolidation, merger, sale, purchase or lease to exchange the securities held by it for the securities issued in connection therewith; (4) to pay all assessments, subscriptions and other sums of money necessary to the pro-

53 tection of its interests as holder of any stocks, bonds or other securities of any corporation or company; (5) to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities; (6) to take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefor.

In the event that the settlor shall have omitted to give any written directions, the trustees may request in writing from the settlor such written directions as to the action to be taken with regard to any of the matters set forth in this article, and if the settlor shall neglect or refuse or be unable to give such written directions for a period of thirty (30) days after such request, the trustees are hereby authorized and empowered to take such action as they may deem proper and desirable with regard to such matters.

Eighth. In case of securities taken or purchased for the trust fund at a premium, the trustees shall not be required to set aside any part of the income thereof as a sinking fund to retire or absorb such premium, or to make any other provision for possible depreciation

in the value of the securities constituting the trust fund by reason of the approaching maturity of said securities, or otherwise.

Ninth. The trustees are authorized and empowered to pay out of the income received from the trust fund any and all taxes
54 which may become properly payable, from time to time, under the laws of the United States, or of any State, county, or municipality in respect of said trust property, or in respect of any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws. All taxes and all expenses connected with the administration of the said trust, including the trustees' commissions, payable out of income, shall be deducted from and paid out of the income of the trust fund.

Tenth. The settlor covenants and agrees to make, execute, and deliver in due form of law such other and further assignments, conveyances or other instruments as the trustees may deem requisite or necessary to effectuate the purpose hereof.

Eleventh. Anything herein to the contrary notwithstanding, the settlor may, from time to time during the continuance of the trust, by instrument in writing executed and acknowledged in the manner required for a deed of real property, so as to enable it to be recorded in the State of New Jersey, and delivered to the trustee, or their successors, modify or alter in any way or revoke in whole or in part this agreement and the trust then existing, and the estates and interests in property hereby created and provided for, and in case of such modification, alteration or revocation said instrument shall direct the disposition to be made of the trust fund, or of the part
55 of the trust fund affected by such modification, alteration, or revocation, and upon delivery of such instrument to the trustees, or their successors, said instrument shall take effect according to its provisions, and the trustees, or their successors, shall make, execute and deliver all such documents, and make such conveyances, transfers and deliveries of property, rights, interests and securities as may be necessary or proper in order to carry the same into effect, and no one shall have any right, interest, or estate under this agreement, except subject to and in accordance with such modification, alteration or revocation thereof; provided, however, that no power of revocation in this agreement reserved or contained shall affect the income at any time received or accrued upon the trust fund, or upon the properties, interests or securities originally or at any time comprised therein, or affect any accumulations or investments of such income; but the legal ownership and title of the trustees and the beneficial ownership and title of the beneficiary, or beneficiaries, in and to such income shall be and remain absolute and indefeasible, subject only to such directions as the settlor may give to the trustees under the powers herein reserved or contained, as to the respective proportions of income to be paid over or accumulated, or as to the investment or reinvestment of accumulations or varying the respective

shares of the beneficiaries in the income to be paid over or accumulated.

Twelfth. The corporate trustee shall be entitled to receive as compensation for its services in the administration of this trust,
56 a commission of one-half of one per cent (.01½%) per annum upon all income received under the trust, and is hereby authorized to deduct such commission from the said income. In case of the termination of the trust by revocation as hereinbefore provided prior to the expiration of five (5) years from the date hereof, the corporate trustee shall be entitled to receive, in addition to the aforesaid commission theretofore received by it, a commission of ten thousand dollars ($10,000). In case of the termination of the trust otherwise than by revocation, the corporate trustee shall be entitled to no other or further commission than herein first specified. The individual trustee shall be entitled to receive as compensation for his services a commission at the rate of five hundred dollars ($500.) per annum, payable in semi-annual installments on the first day of January and July in each year, while acting as trustee hereunder, and the corporate trustee is hereby authorized to deduct such commission from the said income.

Thirteenth. The trustees by joining in the execution of this instrument signify their acceptance of the trust herein created, and covenant and agree with the settlor that they will faithfully perform the duties thereof according to the best of their skill, knowledge and ability, but the trustees shall not be responsible for any action taken by them in the administration of the trust if taken in accordance herewith or with any written direction to them by the settlor, or for any mistake in judgment or decreases in value of the trust fund.

57 Fourteenth. This agreement and the trust created by this agreement shall be performed, executed, and administered in the State of New Jersey, and the laws of the State of New Jersey shall govern the validity, interpretation, administration, and enforcement thereof. The properties, interests, and securities comprising the trust fund, together with the income thereof, shall at all times until the termination of the trust be held, kept, and retained by the trustees in the State of New Jersey. Upon the termination of the trust, the trust fund and its accumulations, and the income thereof, shall be conveyed, delivered, and paid over in the State of New Jersey, to the person or persons who shall then be entitled to take and receive the same as herein provided, or to the duly authorized agent, attorney, or representative of such person or persons.

Fifteenth. The individual trustee may at any time resign his trust hereunder by a writing signed by him and delivered to the corporate trustee, accompanied by a proper transfer and release of his title to and interest in the trust fund and properties. The settlor may at any time dispense with an individual trustee in the performance or execution of the trust, or substitute another person for the person originally named as individual trustee hereunder, by a writing signed in duplicate by the settlor and delivered to the individual trustee and the corporate trustee; and upon delivery of such writing, the trustee-

ship of the person so originally named shall be rendered va-
58 cant. In the event of the death, resignation, disability, or substitution of the individual trustee, the trusteeship thereby rendered vacant may be filled by the appointment in writing of the settlor delivered to the corporate trustee, and thereupon the person so designated upon his written acceptance of the appointment duly acknowledged and deposited with the corporate trustee shall become vested with all the rights, powers, duties, and obligations of the individual trustee originally named in this agreement; if, however, the death, resignation, or disability of the individual trustee occur after the demise of the settlor, such vacant trusteeship may be filled by appointment by a court of the State of New Jersey of competent jurisdiction.

Sixteenth. The corporate trustee shall have the custody of the trust fund and the accumulations thereon, and may receive, collect, sue, and receipt for and disburse and apply the income of the trust fund, as well as do and perform all ministerial acts and duties involved in the administration of the trust, including the making, signing, and indorsing of checks, drafts, bills, notes, and other commercial paper, and the depositing of moneys, independently of the individual trustee, and in its own name, without the joint action of the individual trustee in so doing; provided, however, that access to the vault or place of safe deposit wherein the properties and securities comprising the trust fund are kept shall be had, and the depositing therein and withdrawal therefrom of any such properties
59 or securities shall be done, jointly by an officer of the corporate trustee and the individual trustee and in the presence of both; that the assignment, transfer, sale, or exchange of any stocks, bonds, or other corporate or other securities shall be executed and effected by the joint action of both trustees and in the name of both; and that all matters connected with the execution of the trust calling for the exercise of judgment and discretion shall likewise require the concurrence and joint action of both trustees. Notwithstanding, however, the death, resignation, or disability of the individual trustee, the settlor may at his option, or the court aforesaid after the death of the settlor may in its discretion, dispense with an individual trustee in the performance and execution of the trust by omitting or failing to appoint such trustee, in which case, as well as during any interval pending such appointment, the corporate trustee shall be clothed with and shall be empowered to exercise all the rights and powers vested in the trustees under this agreement, to the same extent and with the like effect as if the corporate trustee had originally been made the sole trustee hereunder, and all provisions herein relative to the action of the individual trustee hereunder shall be held for nought.

Seventeenth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

60 Eighteenth. This agreement, made as of the same date as a prior trust agreement of the same import, between the same

parties and in the interest of the same beneficiary, is made for the purpose of embodying in one document the said prior agreement, and certain further stipulations affecting the terms of the trust now evidenced by separate supplemental instruments, and for the further purpose of more closely defining the intent of the settlor, and shall apply to and govern the said trust and the execution and administration thereof as if the same had been originally created hereby; to which end the said prior trust agreement and supplemental instruments shall be, and hereby are, superseded by this agreement, and shall be and are of no further force and effect; provided, however, that all acts or things hitherto done or performed by any of the parties hereto under and by virtue of the said prior trust agreement and of agreements supplemental thereto are hereby ratified, approved, and confirmed, and shall be considered and held as having been done and performed under and pursuant to this agreement. In furtherance hereof, the said prior trust agreement made as of the 28th day of June, 1917, and supplemental instruments have coincidentally with the execution and delivery of this agreement been marked "Superseded and canceled."

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

61 In witness whereof, the settlor has hereunto set his hand and seal, and the corporate trustee has caused these presents to be signed by its president, and its corporate seal to be hereunto affixed and attested by its secretary, and the individual trustee has hereunto set his hand and seal, as of the day and year first above written.

Signed, sealed, and delivered
in the presence of—

W. F. W. VEYSEY. MORRIS GUGGENHEIM. [SEAL.]

W. F. W. VEYSEY. CLARENCE L. MYERS. [SEAL.]

COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*

Attest:
J. S. PERKINS, *Secretary.*
[SEAL.]

62 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on the 1st day of April, A. D., 1918, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

J. FISHER ANDERSON,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 1st day of April, A. D. 1919, before me the subscriber personally appeared Jay S. Perkins, who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by J. W. Harden-
63 bergh, who was at the date of execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

JAY S. PERKINS.

Subscribed and sworn to before me the date aforesaid.

J. FISHER ANDERSON,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 1st day of April, A. D. 1918, before me the subscriber personally appeared CLARENCE L. MYERS, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

J. FISHER ANDERSON,
Master in Chancery of New Jersey.

64 *Edmond A. Guggenheim trust, Exhibit No. 3*

THIS INSTRUMENT, made and executed in Jersey City, New Jersey, on the 12th day of May, 1920, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," and Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at number 15 Exchange Place, Jersey City, New Jersey, as trustee, and Clarence L. Myers, a resident of Red Bank, county of Monmouth, State of New Jersey, as trustee, hereinafter called the "trustee."

Whereas, by a certain trust agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between the above-named settlor and the above-named trustee, the settlor did create a trust of and in certain property and for certain purposes as in the said agreement specified, for the benefit of the certain person or persons therein named; and

Whereas, the settlor, pursuant to the power reserved to him in and by the eleventh paragraph of the said trust agreement of the

28th day of June, 1917, desires to modify and amend the said trust agreement and the trust as it now exists thereunder.

Now, therefore, this instrument witnesseth:

That the settlor, by virtue of the power and authority vested
65 in him pursuant to the provisions of the said eleventh paragraph of the said trust agreement of the 28th day of June, 1917, does hereby modify and amend the said trust agreement and the trust existing thereunder by incorporating in the said trust agreement, as an addition to the first paragraph thereof and as a further term or condition of the said trust, the following provision:

"In respect to the accumulated income of the trust fund at any time accrued and received thereon and held by the trustees as an addition to and part of the principal of the trust fund, whether in the shape of money or other funds or in the shape of securities or other property, and either before or after investment or reinvestment, the Settlor may at any time and from time to time, by directions in writing signed by him and delivered to the trustees, cause and require such accumulated income, or any part or parts thereof, to be assigned, transferred, conveyed, paid over, surrendered and delivered by the trustees to the beneficiary of the said trust, Edmond A. Guggenheim, absolutely and free of all restrictions."

In witness whereof, the settlor has hereunto set his hand and seal, and the corporate trustee has caused these presents to be signed by its president and its corporate seal to be hereunto affixed and
66 attested by its secretary, and the individual trustee has hereunto set his hand and seal, on the day and year first above written.

Signed, sealed, and delivered
in the presence of—

WILLARD C. FISK.

MORRIS GUGGENHEIM. [SEAL.]

CLARENCE L. MYERS. [SEAL.]

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*

Attest:
J. S. PERKINS, *Secretary.*
[SEAL.]

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 12th day of May, A. D. 1920, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him

the contents thereof, he did acknowledge that he signed,
67 sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

WILLARD C. FISK,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 12th day of May, A. D. 1920, before me the subscriber personally appeared Jay S. Perkins, who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by John W. Hardenbergh, who was at the date of the execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

JAY S. PERKINS.

Subscribed and sworn to before me, the date aforesaid.

WILLARD C. FISK,
Master in Chancery of New Jersey.

68 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this day of , A. D. 1920, before the subscriber personally appeared Clarence L. Myers, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

WILLARD C. FISK,
Master of Chancery of New Jersey.

Edmond A. Guggenheim trust, Exhibit No. 4

JERSEY CITY, N. J., *March 2, 1921.*

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
15 Exchange Place, Jersey City, N. J.

Mr. MORRIS GUGGENHEIM,
15 Exchange Place, Jersey City, N. J.

GENTLEMEN: I hereby tender my resignation as individual
69 trustee of the trust for the benefit of Edmund A. Guggenheim, existing by virtue of the trust agreement dated as of the 28th day of June, 1917, between yourselves and the undersigned and of

any agreement or instruments amendatory thereof or supplementary thereto; this resignation to take effect immediately upon its acknowledgment by you.

As provided in article fifteenth of the trust agreement of June 28, 1917, I enclose herewith a transfer and release of my title to and interest in the trust fund and properties.

Very truly yours,

CLARENCE L. MYERS.

Edmond A. Guggenheim trust, Exhibit No. 5

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Clarence L. Myers, the person named as individual trustee in a certain trust agreement dated as of the 28th day of June, 1917, between Morris Guggenheim and Commercial Trust Company of New Jersey, corporate trustee, and Clarence L. Myers, of Red Bank, county of Monmouth, State of New Jersey, as individual trustee, creating a certain trust for the benefit of Edmond A. Guggenheim, and in certain agreements or instruments amendatory thereof or supplementary thereto, in consideration of one dollar lawful money of the United States to him in hand paid before the sealing and
70 delivery of these presents, the receipt whereof is hereby acknowledged, has sold, assigned, transferred, set over, released, surrendered, and delivered, and by these presents does sell, assign, transfer, set over, release, surrender, and deliver, unto Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, as trustee under the trust agreement aforesaid, and the amendments thereof and supplements thereto, all his right, title, and interest in and to the trust fund and properties comprised in the said trust and all his right, title, and interest in, to, and under the said trust agreement and the amendments thereof and supplements thereto, to have and to hold unto the said Commercial Trust Company of New Jersey, as trustees, as aforesaid.

In witness whereof, the said Clarence L. Myers has signed, sealed, and delivered these presents in Jersey City, New Jersey, on this 3rd day of March, 1921.

CLARENCE L. MYERS. [SEAL.]

Witness:
WM. V. TOFFEY.

List of securities held by Commercial Trust Company of New Jersey and Clarence L. Myers, trustees under the trust agreement of Morris Guggenheim for Edmond A. Guggenheim, dated the 28th day of June, 1917, at the close of business March 3rd, 1921:

71 2,300 shares Utah Copper Corporation.
102,750 " Chile Copper Company.

$506,500 par value Chile Copper Company coll. trust 7% gold bonds.
1,300,000 par value Chile Copper Company coll. trust series A 6% gold bonds.
174,000 par value United States of America Victory L. L. 4¾% notes.
2,500 shares New York & Honduras Rosario Mining Company.
2,754 shares Sidney Blumenthal Co. first preferred.
5,000 shares Sidney Blumenthal Co. second preferred.
3,025 shares Bunker Hill & Sullivan Mining & Concentrating Co.

COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By J. S. PERKINS, *V. P.*,
CLARENCE L. MYERS,
Trustees under the Trust Agreement of Morris Guggenheim for Edmond A. Guggenheim, Dated the 28th Day of June, 1917.

Attest correct:
GEO. LETTERHOUSE.

72 *Edmond A. Guggenheim trust, Exhibit No. 6*

JERSEY CITY, N. J., *March 2, 1921.*

Mr. CLARENCE L. MYERS,
15 Exchange Place, Jersey City, N. J.

DEAR SIR: Receipt is hereby acknowledged of your letter of March 2nd, 1921, addressed to the undersigned, tendering your resignation as individual trustee of the trust for the benefit of Edmond A. Guggenheim, existing by virtue of the trust agreement dated as of the 28th day of June, 1917, between yourself and the undersigned and of any agreements or instruments amendatory thereof or supplementary thereto. Receipt is also acknowledged of the transfer and release in favor of the Commercial Trust Company of New Jersey of your title to and interest in the trust fund and properties.

Since your resignation was made effective upon its acknowledgment by the undersigned, this letter of acknowledgment will serve as evidence of the fact that your resignation became effective on the date hereof.

Very truly yours,

COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*
MORRIS GUGGENHEIM.

73 *Edmond A. Guggenheim trust, Exhibit No. 7*

Murry Guggenheim, 120 Bro'dway, New York.

JERSEY CITY, N. J., *March 2, 1921*

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
15 Exchange Place, Jersey City, N. J.
Mr. CLARENCE L. MYERS,
15 Exchange Place, Jersey City, N. J.

GENTLEMEN: Referring to the trust agreement dated as of the 28th day of June, 1917, between yourself and the undersigned, creating a trust for the benefit of Edmond A. Guggenheim, and to the instruments or agreements amendatory thereof or supplementary thereto, and in view of the resignation of Clarence L. Myers as individual trustee of the said trust under the said agreement and the amendments thereof and supplements thereto this day tendered, please be advised that, as authorized by the fifteenth article of the said trust agreement, an individual trustee is hereby dispensed with in the performance and execution of the said trust.

Signed and delivered in duplicate.

Very truly yours,

MORRIS GUGGENHEIM.

74 *Edmond A. Guggenheim trust, Exhibit No. 8*

THIS INSTRUMENT, made and executed in Jersey City, New Jersey, on the 3rd day of March, 1921, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," and Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at number 15 Exchange Place, Jersey City, New Jersey, as trustee, hereinafter called the "trustee."

Whereas, by a certain trust agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between the above-named settlor and the said Commercial Trust Company of New Jersey and Clarence L. Myers, trustees, and by an instrument between the same parties, dated the 12th day of May, 1920, supplementary to and amendatory of the said trust agreement, the settlor did create a trust of and in certain property, for certain purposes as in the said agreement and instrument specified, for the benefit of the certain person or persons therein named; and

Whereas, the settlor, pursuant to the power reserved to him in and by the eleventh paragraph of the said trust agreement of the 28th day of June, 1917, desires to modify and alter the terms and provisions of the said trust agreement as amended and the terms and conditions of the said trust so created thereunder;

75 Now, therefore, this instrument witnesseth:

That the settlor, by virtue of the power and authority vested in him pursuant to the provisions of the said eleventh paragraph of

the said trust agreement of the 28th day of June, 1917, does hereby modify and alter the terms and provisions of the said trust agreement and of the said instrument of the 12th day of May, 1920, and the terms and provisions of the said trust agreement and of the said instrument of the 12th day of May, 1920, and the terms and conditions of the trust existing thereunder, as follows:

1. By modifying and altering the terms and provisions of the first article of subdivision of the said trust agreement of the 28th day of June, 1917, so that the same shall read as follows:

"First. In the manner hereinafter specified, to receive, hold, manage, sell, exchange, invest, reinvest, deal with and dispose of the same and every part thereof, and to collect, recover and receive the rents, issues, interest, income and profits thereof, hereinafter called the 'income' thereof; and to pay such income to the extent of Thirty thousand dollars ($30,000) thereof per annum to the son of the settlor, Edmond A. Guggenheim, in quarterly instalments, payable, respectively, on the first day of January, April, July, and October in each and every year for and during the natural life of the
76 settlor, and to invest the remainder of all such income (less any amount or amounts thereof which the trustee may be required to deduct and withhold therefrom and to pay under any present or future income-tax law or other law, and after deducting therefrom the commissions of the trustee hereinafter provided for and the proper and necessary expenses of administering the trust) in other property or securities, which shall be when acquired added to the property or securities already held by the trustee hereunder and subject to the same terms and conditions of trust as an integral part of the trust fund; and from and after the death of the settlor, to pay all such income thereafter accruing (less the deductions hereinbefore specified) to the said Edmond A. Guggenheim for and during his natural life. The settlor may at any time, and from time to time, by directions in writing delivered to the trustee, increase the aggregate amount of payments to be made annually to the said Edmond A. Guggenheim above the yearly rate or sum hereinbefore specified, to any extent not exceeding the full amount of the annual net income of the trust fund; and the settlor may likewise at any time, and from time to time, by directions in writing delivered to the trustee, decrease the aggregate amount of the payments to be made annually to the said Edmond A. Guggenheim below any amount to which such payments
77 may previously have been increased as herein provided, to any extent down to the amount of such payments first hereinbefore specified."

2. By modifying and altering the terms and provisions of the second article or subdivision of the said trust agreement of the 28th day of June, 1917, so that the same shall read as follows:

"Second. Upon the death of the said Edmond A. Guggenheim, the trustee thenceforth shall hold, administer and apply the trust

fund and the income thereof in trust for the use, benefit and advantage of the granddaughter of the settlor, the daughter of the said Edmond A. Guggenheim, Natalie Guggenheim, and shall pay the income of the trust fund (less the deductions hereinbefore specified) to the said granddaughter of the settlor, Natalie Guggenheim, for and during her natural life; provided, however, that if at the time of the death of the said Edmond A. Guggenheim the said Natalie Guggenheim shall be under age the trustee shall pay to the duly appointed legal guardian or guardians of the said Natalie Guggenheim, out of the income of the trust fund, such periodical allowance as in the absolute judgment of such guardian or guardians shall be sufficient and appropriate adequate-
78 ly to provide for her maintenance, care, education, and personal and social needs and requirements, due consideration being given to her position, means and habit and mode of life, until she shall have arrived at the age of twenty-one years, the balance of such income over and above the amount of such allowance (less the deductions hereinbefore specified) to be invested, reinvested, accumulated and added to the principal of the trust fund; and when the said Natalie Guggenheim shall have arrived at the age of twenty-one years the entire income of the trust fund thereafter accruing (less the deductions hereinbefore specified) shall be paid to her for and during her naturel life; and upon the death of the said Natalie Guggenheim the said trust fund and all the property, money, and securities then comprising the same, together with all income, gains and profits thereof and all accumulations thereon, in the hands of the trustee, shall be paid over, surrendered and delivered, or otherwise distributed, as she the said Natalie Guggenheim may have by her last will duly and finally admitted to probate directed and appointed, or if there be no such will the same shall be paid over, surrendered and delivered to the duly appointed administrator or administrators of the said Natalie Guggenheim to be by such administrator or administrators disposed of and distributed as the laws of her domicile may prescribe in the case of her intestacy,
79 and upon such payment, surrender, and delivery the trustee shall be discharged of all further duties and obligations in the premises.

"In the event that the said Natalie Guggenheim shall predecease the said Edmond A. Guggenheim, then upon his death the said trust fund and all the property, money, and securities then comprising the same, together with all income, gains, and profits thereof and all accumulations thereof, in the hands of the trustee, shall be paid over, surrendered and delivered, or otherwise distributed as he the said Edmond A. Guggenheim may have by his last will duly and finally admitted to probate directed and appointed, or if there be no such will the same shall be paid over, surrendered and delivered to the administrator or administrators of the said Edmond A. Guggenheim to be by such administrator or administrators disposed of and distributed as the laws of his domicile may prescribe in the

case of his intestacy, and upon such payment, surrender and delivery the trustee shall be discharged of all further duties and obligations in the premises; provided, however, that if both the said Natalie Guggenheim and the said Edmond A. Guggenheim shall die during the lifetime of the settlor, then upon the death of the beneficiary who shall survive the longer the trust fund and all the property, interests and securities then comprising the same, together with
80 all income, gains and profits thereof and all accumulations thereon, in the hands of the trustee, shall be paid over, surrendered and delivered to the settlor, and if both the said Natalie Guggenheim and the said Edmond A. Guggenheim shall die after the death of the settlor, but during the lifetime of the wife of the settlor, Leonie Guggenheim, then upon the death of the beneficiary who shall survive the longer the trust fund and all the property, interests and securities comprising the same, together with all income, gains and profits thereof and all accumulations thereon, shall be paid over, surrendered and delivered to the said wife of the settlor, Leonie Guggenheim.

"In respect to the accumulated income of the trust fund at any time accrued and received thereon and held by the trustee as an addition to and part of the principal of the trust fund, whether in the shape of money or other funds or in the shape of securities or other property, and either before or after investment or reinvestment, the settlor may at any time and from time to time, by direction in writing signed by him and delivered to the trustee, cause and require such accumulated income, or any part or parts thereof, to be assigned, transferred, conveyed, paid over, surrendered and delivered by the trustee to the said Edmond A. Guggenheim and the said Natalie Guggenheim, or either of them, absolutely and free of all restrictions.

81 "Out of income of the trust fund available for accumulation as hereinbefore provided the trustee shall pay to Clarence L. Myers, formerly the individual trustee named in the said trust agreement of the 28th day of June, 1917, the sum of five hundred dollars ($500) per annum for and during the three calendar years beginning with the first day of July, 1921, and ending with the thirtieth day of June, 1924, payable semi-annually."

3. By modifying and altering the terms and provisions of the fifth article or subdivision of the said trust agreement of the 28th day of June, 1917, so that the same shall read as follows:

"Fifth. Sales, exchanges, and substitutions of property or securities comprising the trust fund, and investments and reinvestments for the trust fund, and of income subject to investment or reinvestment, shall be made in accordance with the best judgment and discretion of the trustee after the death of the settlor, and prior thereto if, when and as directed in writing by the settlor so long as he shall live, to whom alone during his lifetime is reserved the right of deciding upon and authorizing the making of any and all such changes in the trust fund caused by sales, exchanges and substitutions of

property, securities comprising the trust fund and investments
82 and reinvestments of the trust fund and of income subject to investment or reinvestment, and the right of causing such changes to be effectuated; and the trustee shall be fully protected in making any such sales, exchanges, substitutions, investments and reinvestments as shall be directed in writing by the settlor, and shall not be liable or responsible in any way for depreciation or loss incurred by reason of any such sales, exchanges, substitutions, investments or reinvestments so made. No purchaser upon any sale by the trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the authority, validity, expediency or propriety of any such sale. The trustee, after the death of the settlor, is authorized to retain and hold for the purposes of the trust any and all of the stocks, bonds or other securities comprised in the trust fund at the time of the death of the settlor, including such thereof as may be unproductive of income, or as may be, or may be deemed to be, hazardous or speculative investments, and in case of losses or expense arising from the exercise of the authority hereby conferred upon the trustee, it shall not be held liable therefor. Without intending to control the lawful discretion of the trustee, should circumstances arise after the death of the settlor to make it necessary
or desirable in its best judgment to alter the investments com-
83 prised in the trust fund, the trustee shall nevertheless understand, from the fact that the stocks, bonds and other securities then comprising the trust fund are included therein, that the settlor believed in their intrinsic and permanent value and would request that the investments represented by such stocks, bonds and securities be not changed except for good and sufficient reason. Investments or reinvestments made by the trustee after the death of the settlor shall be made in such securities or properties as trustees are authorized or permitted to invest in by the laws of the State of New Jersey."

4. By modifying and altering the terms and provisions of the eleventh article or subdivision of the said trust agreement of the 28th day of June, 1917, so that the same shall read as follows:

"Eleventh. Anything herein to the contrary notwithstanding, the settlor may from time to time during the continuance of the trust, by instrument in writing executed and acknowledged in the manner required for a deed of real property, so as to enable it to be recorded in the State of New Jersey, and delivered to the trustee, or its successor, modify or alter in any way or revoke in whole or in part this agreement and the trust then existing, and the estates and interests
in property hereby created and provided for, and in case of
84 such modification, alteration or revocation said instrument shall direct the disposition to be made of the trust fund, or of the part of the trust fund affected by such modification, alteration, or revocation, and upon delivery of such instrument to the trustee, or its successor, said instrument shall take effect according to its provisions, and the trustee, or its successor, shall make, execute, and deliver all such documents, and make such conveyances, trans-

fers, and deliveries of property, rights, interests, and securities as may be necessary or proper in order to carry the same into effect, and no one shall have any right, interest, or estate under this agreement, except subject to and in accordance with such modification, alteration, or revocation thereof; provided, however, that no power of revocation in this agreement reserved or contained shall affect the income at any time received or accrued upon the trust fund, or upon the properties, interests, or securities originally or at any time comprised therein, or affect any accumulations or investments of such income; but the legal ownership and title of the trustee and the beneficial ownership and title of the beneficiary, or beneficiaries, in and to such income shall be and remain absolute and indefeasible, subject only to such direction as the settlor may give to the trustee under the powers herein reserved or contained, as to the respective proportions of income to be paid over or accumulated,
85 or as to the investment or reinvestment of accumulations or varying the respective shares of the beneficiaries in the income to be paid over or accumulated; and provided further that after the expiration of ten (10) years from the 28th day of June, 1917, no power of revocation in this agreement reserved or contained shall be effective to abrogate the trust, or to destroy the principal or corpus of the trust fund, or to withdraw the properties, interests, and securities comprising the trust fund from the operation of the trust (otherwise than by way of exchange, substitution, or sale for reinvestment), but the legal ownership and title of the trustee and the beneficial ownership and title of the beneficiaries in and to the said principal or corpus of the trust fund and the properties, interests, and securities comprising the same shall be and remain absolute and indefeasible, subject only to such directions as the settlor may give to the trustee, and to such modifications or alterations as the settlor may make in the provisions of the trust, under the powers in this agreement reserved or contained, as to the management of the trust fund, the relative interests of the beneficiaries therein, the respective shares of the beneficiaries, their powers with respect to such shares, the time and manner of making distribution, by way of advancement or otherwise, of principal or income, and as to the making of sales, exchanges, and substitutions of property in, and investments and reinvestments for, the trust fund."

86 5. By modifying and altering the terms and provisions of the twelfth article or subdivision of the said trust agreement of the 28th day of June, 1917, so that the same shall read as follows:

"Twelfth. The trustee shall be entitled to receive as compensation for its services in administering this trust during the lifetime of the settlor a commission of two thousand dollars ($2,000) per annum, and, after the death of the settlor, a commission of two thousand five hundred dollars ($2,500) per annum; provided, however, that should the income of the trust fund in any year after the death of the settlor exceed the sum of two hundred and fifty thousand dollars ($250,000), the trustee shall be entitled to receive for such year, as additional compensation, a sum equivalent to one-half

of one per centum (½ of 1%) of the amount of such income in excess of the said sum of two hundred and fifty thousand dollars ($250,000). In case of the termination of the trust by revocation as hereinbefore provided prior to the expiration of five (5) years from the date hereof, the trustee shall be entitled to receive, in addition to the aforesaid commission theretofore received by it, a commission of ten thousand dollars ($10,000). In case of the termination of the trust otherwise than by revocation, the trustee shall be entitled to no other or further commission than herein first specified."

87 6. By modifying and altering the terms and provisions of the said trust agreement of the 28th day of June, 1917, so as to eliminate and cancel the fifteenth article or subdivision thereof, which shall hereafter be disregarded and held for naught.

7. By modifying and altering the terms and provisions of the said trust agreement of the 28th day of June, 1917, including the sixteenth article or subdivision thereof, so as to eliminate and cancel all references in said agreement and in said article or subdivision to the individual trustee, and all provisions in the said agreement and in the said article or subdivision relative to the individual trustee, and to the powers and duties of such trustee shall hereafter be held for naught, an individual trustee having heretofore been dispensed with in the performance of the trust. The word "trustees" wherever it appears in the said trust agreement shall hereafter be read in the singular, as "trustee."

8. The terms and provisions of the said first, second, fifth, eleventh, twelfth, fifteenth, and sixteenth articles or subdivisions, as set forth in the said trust agreement of the 28th day of June, 1917, as amended by the said instrument of the 12th day of May, 1920, shall hereafter be disregarded and held for naught, and the terms and provisions of the said trust agreement and of the said first, second, fifth,

88 eleventh, twelfth, and sixteenth articles or subdivisions thereof as hereby modified and altered and as herein set forth or amended, shall hereafter govern the administration and execution of the trust.

In witness whereof, the settlor has hereunto set his hand and seal, and the trustees has caused these presents to be signed by its president and its corporate seal to be hereunto affixed and attested by its secretary, on the day and year first above written.

MORRIS GUGGENHEIM. [SEAL.]

Signed, sealed, and delivered
in the presence of—
WM. V. TOFFEY.

Attest:
R. S. CARMICHAEL, *Secretary.*

COMMERCIAL TRUST COMPANY,
OF NEW JERSEY,
By W. J. HARDENBERGH, *President.*

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 3rd day of March, 1921, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and
89 delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.]

WM. V. TOFFEY,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 3rd day of March, 1921, before me the subscriber personally appeared Robert S. Carmichael, who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by John W. Hardenbergh, who was at the date of execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

R. S. CARMICHAEL.

Subscribed and sworn to before me, the date aforesaid.

[SEAL]

WM. V. TOFFEY,
Notary Public of New Jersey.

90 *Edmond A. Guggenheim trust, Exhibit No. 9*

INSTRUMENT, made and executed in Jersey City, New Jersey, on the 5th day of May, 1921, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," the Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at number 15 Exchange Place, Jersey City, New Jersey, as trustee, hereinafter called the "trustee," and Louis F. Rothschild and Clarence L. Myers, both of the city, county, and State of New York.

Whereas, by a certain trust agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between the above-named settlor and the said commercial trust company of New Jersey and Clarence L. Myers, trustees, and by an instrument between the same parties, dated the 12th day of May, 1920, supplementary to and amendatory of the said trust agreement, and by a

further instrument between the settlor and the Commercial Trust Company of New Jersey, dated the 3rd day of March, 1921, the settlor did create a trust (known as the Edmond A. Guggenheim trust) of and in certain property, for certain purposes as in the said agreement and instruments specified, for the benefit of the certain person or persons therein named; and

Whereas, by the terms of the said agreement and instruments
91 (a) the right of deciding upon and authorizing the making of any and all changes in the trust fund caused by sales, exchanges, and substitutions of property or securities comprising the trust fund and investments and reinvestments of the trust fund and of income subject to investment or reinvestment and the right of causing such changes to be effectuated is reserved to the settlor to be exercised by him by directions in writing to the trustee, and (b) the authority and power of the trustee to do and perform the several acts and things enumerated in the seventh article or subdivision of the said trust agreement of the 28th day of June, 1917 (i. e., to vote in person or by proxy upon all stocks; to exchange securities; to consent to the reorganization, consolidation, or merger of any corporation or to the sale or lease of its property; to pay all the assessments, subscriptions, or other sums of money necessary to the protection of the trustee as holder of any stocks or other securities; to exercise any option contained in any stocks, bonds, or other securities for the convention of the same; and to take advantage of any rights to subscribe for additional stocks, bonds, or other securities and to make any and all necessary payments therefor, and the like), are subject in each and every instance to the written approval and direction of the settlor; and

Whereas, the settlor desires to relinquish and divest himself of the said rights and powers so reserved to or retained by him of
92 directing or controlling the administration of the trust and management of the trust fund and to confer the said rights and powers upon and to vest in the said Louis F. Rothschild, in the first instance, and (contingently) upon and in the said Clarence L. Myers, to the end that the said Louis F. Rothschild (and contingently the said Clarence L. Myers) shall be substituted for the settlor as the person by whom the said rights and powers may be exercised; the intention being that, whereas it has been the purpose of the settlor heretofore that the trust estate should have the benefit of the special knowledge, experience, judgment, and discretion of the settlor in respect of the several matters and things to which the said rights and powers relate, it is now the purpose of the settlor that hereafter the trust estate shall have the benefit of the special knowledge, experience, judgment, and discretion of the said Louis F. Rothschild (or contingently the said Clarence L. Myers) in respect to the said matters and things;

Now, therefore, this instrument witnesseth:

1. That, in consideration of the premises, the settlor has remised, released, relinquished, granted, bargained, sold, assigned, transferred and set over, and by these presents does remise, release, relinquish,

grant, bargain, sell, assign, transfer and set over, unto the said Louis F. Rothschild and the said Clarence L. Myers, severally and respectively, but not jointly, all the rights and powers reserved to or
93 retained by him under and by virtue of the fifth and seventh articles or subdivisions of the said trust agreement of the 28th day of June, 1917, of directing or controlling the administration of the said trust and the management of the trust fund and the action of the said trustee in respect to such administration and management, as set forth in the said articles or subdivisions as so amended; to have and to hold unto and to the exclusive use of the said Louis F. Rothschild and the said Clarence L. Myers, severally and respectively, for and during the life of the settlor; provided, however, that this transfer and conveyance of the said rights and powers to the said Clarence L. Myers shall take effect, if at all, only upon the death of the said Louis F. Rothschild prior to the death of the settlor, or upon his written refusal to exercise the said rights and powers delivered to the said trustee prior to such death, and not otherwise. The said Louis F. Rothschild and the said Clarence L. Myers by becoming parties to this instrument each for himself respectively accepts this transfer and conveyance of the said rights and powers and agrees and undertakes to use his best judgment and discretion in the exercise of the said rights and powers. The said Commercial Trust Company of New Jersey by becoming a party to this instrument consents to the said transfer and conveyance of the said rights and powers to, and their assumption and exercise by, the said Louis F. Rothschild and the said Clarence L. Myers as in this instrument provided.

94 2. The right, title, and interest of the trustee, the Commercial Trust Company of New Jersey, in the trust fund and in the properties, interests, and securities comprising the same, and in the management of the trust fund, arising and existing under and by virtue of the said trust agreement of the 28th day of June, 1917, as supplemented, modified, or amended by the said instruments of the 12th day of May, 1920, and the 3rd day of March, 1921, are hereby in all respects ratified and confirmed, subject to the terms and conditions of the said trust and subject to the exercise during the life of the settlor by the said Louis F. Rothschild or the said Clarence L. Myers of the rights and powers of this instrument conferred upon them severally and respectively.

3. As to any and all matters in respect to which the said rights and powers hereby transferred and conveyed may be exercised, the trustee may request in writing from the said Louis F. Rothschild (or the said Clarence L. Myers) written directions as to the action to be taken, and if the said Louis F. Rothschild (or the said Clarence L. Myers) shall refuse or neglect or be unable for any reason to give such written directions for a period of thirty days after such request has been mailed to his last known place of residence, the trustee is authorized and empowered to take such action in the premises as it may deem proper and desirable under the circumstances. The trustee shall be fully protected in taking any action in respect

95 of which the said rights and powers may be exercised which it may have received written directions from the said Louis F. Rothschild (or the said Clarence L. Myers) to take, as fully to all intents and purposes as it would have been protected in like case had such written directions been given by the settlor under the terms and conditions of the trust as they have heretofore existed.

4. Nothing in this instrument contained shall be deemed to affect or limit the power of the settlor to modify, alter, or revoke the said trust and trust agreement, as said power is reserved to the settlor in the said agreement of the 28th day of June, 1917, and the said instruments supplementary thereto and amendatory thereof. Nor shall anything in this instrument contained, or contained in the said agreement of the 28th day of June, 1917, or the said instruments supplementary thereto or amendatory thereof, be deemed to affect the power of the settlor, by directions in writing given to the trustee, to alter, define, and prescribe the relative interests of the beneficiaries in the trust fund, or the income thereof, their respective shares in the same, their respective powers with respect to such shares, and the time and manner of making distribution to the beneficiaries, or any of them, by way of advancement or otherwise, of principal or income, or both, of the trust fund; which power of the settlor is hereby expressly reaffirmed and reserved.

96 5. The terms, conditions, and provisions of the said agreement of the 28th day of June, 1917, as supplemented, amended, or modified by the said instruments of the 12th day of May, 1920, and the 3rd day of March, 1921, in so far as they are inconsistent with the provisions of this instrument, shall be deemed to be hereby altered and modified; in all other respects the said terms, conditions, and provisions shall remain in full force and effect.

In witness whereof, the settlor has hereunto set his hand and seal and the trustee has caused these presents to be signed by its president and its corporate seal to be hereunto affixed and attested by its secretary, and the said Louis F. Rothschild and the said Clarence L. Myers have hereunto set their hands and seals on the day and year first above written.

Signed, sealed, and delivered
in the presence of—

R. S. CARMICHAEL.

MORRIS GUGGENHEIM. [SEAL.]

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*

97 Attest:
R. S. CARMICHAEL, *Secretary.*
[SEAL.]

WM. V. TOFFEY.

LOUIS F. ROCHSCHILD. [SEAL.]

WM. V. TOFFEY.

CLARENCE L. MYERS. [SEAL.]

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 5th day of May, 1921, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied (is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.]

WM V. TOFFEY,
Notary Public of New Jersey.

98 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 5th day of May, 1921, before me the subscriber personally appeared Robert S. Carmichael, who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by J. W. Hardenbergh, who was at the date of execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

ROBERT S. CARMICHAEL.

Subscribed and sworn to before me, the date aforesaid.

[SEAL.]

WM. V. TOFFEY,
Notary Public, of New Jersey.

99 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 6th day of May, 1921, before me the subscriber personally appeared Louis F. Rothschild, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.]

WM. V. TOFFEY,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 6th day of May, 1921, before me the subscriber personally appeared Clarence L. Myers, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents

thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.]

WM. V. TOFFEY.
Notary Public of New Jersey.

100 *Edmond A. Guggenheim trust, Exhibit No. 10*

INSTRUMENT, made and executed in Jersey City, N. J., on the 16th day of November, 1923, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," and Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at number 15 Exchange Place, Jersey City, New Jersey, as trustee, hereinafter called the "trustee."

Whereas, by a certain trust agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between the above-named settlor and the said Commercial Trust Company of New Jersey and Clarence L. Myers, trustees, as modified and altered by certain supplementary and amendatory agreements or instruments dated, respectively, May 12, 1920, March 3, 1921, and May 5, 1921, the settlor did create a trust of and in certain property, for certain purposes, and for the benefit of certain persons, including the son of the settlor, Edmond A. Guggenheim; and

Whereas, the settlor, pursuant to the power reserved to him in and by the said trust agreement and the said agreements or instruments supplementary thereto and amendatory thereof, "to alter, define and prescribe the relative interests of the beneficiaries in the trust
101 fund, or the income thereof, their respective shares in the same, their respective powers with respect to such shares, and the time and manner of making distribution to the beneficiaries, or any of them, by way of advancement or otherwise, of principal or income, or both of the trust fund," desires further to modify and alter the terms and provisions of the said trust agreement as heretofore supplemented and amended and the terms and conditions of the said trust so created thereunder.

Now, therefore, this instrument witnesseth:

That the settlor by virtue of the power and authority vested in him as aforesaid, does hereby modify and alter the terms and conditions of the said trust by adding to and incorporating in the said trust agreement as heretofore supplemented and amended the following directions and provisions:

1. From and out of the trust fund as heretofore constituted, the trustee shall segregate and set aside five hundred thousand dollars ($500,000) par value of Chile Copper Company 6% collateral trust gold bonds, series A, principal due April 1, 1932. The securities so segregated and set aside, and any other property or securities into

which the same may be converted, or for which the same may be exchanged, or which may be substituted therefor, in whole or in part, or the proceeds realized upon any sale of all or any
102 part of the said securities, shall be held and administered by the trustee as a special trust fund, to be known as the "Edmond A. Guggenheim special fund," for and upon the following uses and trusts:

In trust to receive, hold, manage, sell, exchange, invest, and reinvest the same and every part thereof as provided in the said trust agreement (as heretofore supplemented and amended) with respect to the original trust fund, and to collect, recover, and receive the rents, issues, interest, income, and profits thereof, hereinafter called the "income" thereof, and to pay such income, in quarterly installments, payable respectively on the first day of January, April, July, and October in each year, to the son of the settlor, Edmund A. Guggenheim, for and during his natural life, and upon his death, the said special trust fund, and all the property, money, and securities then comprising the same, together with any undistributed income thereof then in the hands of the trustee, shall be paid over, surrendered, and delivered, or otherwise distributed, as he the said Edmond A. Guggenheim may have by his last will duly and finally admitted to probate directed and appointed, and if there be no such will the same shall be paid over, surrendered, and delivered to the duly appointed administrator or administrators of the said Edmond A. Guggenheim, to be by such administrator or administrators disposed of and distributed as the laws of his domicile may prescribe in case of his intestacy, and upon such payment, surrender, and delivery the trustee shall be discharged of all further duties
103 and obligations in the premises. The income derived from the said special trust fund shall be paid to the said Edmond A. Guggenheim in addition to the income paid to him by virtue of any and all other terms and provisions of the said trust agreement as heretofore supplemented and amended. Deductions from income for the payment of taxes, commissions of the trustee, and expenses of administering the trust shall not be made from income derived from the said special trust fund except to such extent, if any, as income from other properties or funds held by the trustee may be insufficient to provide for such deductions. No power of revocation in the said trust agreement (or in any supplement thereto or amendment thereof) reserved or contained shall affect this disposition and settlement of the said special trust fund, or of the income derived therefrom, but the disposition and settlement of the said special trust fund, and of the income thereof, in this document set forth, shall be and remain final and absolute. In relation to the direction, control, and administration of the said special trust fund and to changes therein by way of sales, exchanges, substitutions, investments, rein-

vestments or otherwise, the provisions of the said trust agreement of June 28, 1917, as heretofore supplemented and amended shall govern.

In witness whereof, the settlor has hereunto set his hand and seal, and the trustee has caused these presents to be signed by its
104 president and its corporate seal to be hereunto affixed and attested by its secretary, on the day and year first above written.

Signed, sealed, and delivered in the presence of—

EBEN C. HASLETT.

MORRIS GUGGENHEIM. [SEAL.]
COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*

Attest:
R. S. CARMICHAEL, *Secretary.*

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 16th day of November, 1923, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] EBEN C. HASLETT,
Notary Public of New Jersey.

105 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 16th day of November, 1923, before me the subscriber personally appeared Robert S. Carmichael, who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by J. W. Hardenbergh, who was at the date of execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

ROBERT S. CARMICHAEL.

Subscribed and sworn to before me the date aforesaid.

[SEAL.] EBEN C. HASLETT,
Notary Public of New Jersey.

106 *Edmond A. Guggenheim trust, Exhibit No. 11*

GUGGENHEIM,
New York.

Morris Guggenheim, Commercial Trust Company of New Jersey, & whom else soever it may concern is to certify that the undersigned desires to relinquish the rights & powers in respect to the Edmond A. Guggenheim trust heretofore conferred upon him by that certain instrument dated May fifth, ninteen twenty-one, between Morris Guggenheim, Commercial Trust Company of New Jersey, Louis F. Rothschild, & Clarence L. Myers & to be relieved of all further duties or responsibilities in the premises & he hereby consents to the vesting of such rights & powers in any other person or persons & accordingly request that appropriate action be taken to that end stop Am mailing certificate to foregoing effect over my signature duly acknowledged.

CLARENCE L. MYERS.

JUNE, 23RD, 1925.

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA,
At the City of Paris, in the Republic of France.

I, Damon C. Woods, consul of the United States of America, at the city of Paris, in the Republic of France, duly commissioned and qualified, do certify that, on this 23rd day of June, 1925, before me personally appeared, in said Paris, France, Clarence L. Myers, to me personally known, and known to me to be the individual de-
107 scribed in, whose name is subscribed to and who executed the foregoing instrument and being by me informed of the contents of said instrument he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

DAMON C. WOODS,
Consul of the United States of America, at Paris, France.

American consulate general (Jun. 23, 1925), Paris, France.
American Consular Service. $2 fee stamp.

Edmond A. Guggenheim trust, Exhibit No. 12

NEW YORK, *June 26th, 1925.*

To Mr. Morris Guggenheim, Commercial Trust Company of New Jersey, and Whom Else Soever It May Concern:

This is to certify that the undersigned desires to relinquish
108 the rights and powers in respect to the Edmond A. Guggenheim trust heretofore conferred upon him by that certain instrument dated May 5, 1921, between Morris Guggenheim, Commercial Trust Company of New Jersey, Louis F. Rothschild, and

Clarence L. Myers, and to be relieved of all further duties or responsibilities in the premises; and he hereby consents to the vesting of such rights and powers in any other person or persons, and accordingly requests that appropriate action be taken to that end.

LOUIS F. ROTHSCHILD.

STATE OF NEW YORK,
County of New York, ss:

Be it remembered that on this 26th day of June, A. D. 1925, before me the subscriber personally appeared Louis F. Rothschild, who, I am satisfied, is the person named in and who executed the foregoing instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed, and delivered the same as his voluntary act and deed for the purposes therein expressed.

[SEAL.]

CHAS. F. KOGEL,
Notary Public, New York County.

N. Y. Co. clerk's No. 167, reg. No. 7080.
Term expires March 30, 1927.

109 *Edmond A. Guggenheim trust, Exhibit No. 13*

INSTRUMENT made and executed in Jersey City, New Jersey, on the 13th day of July, 1925, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at No. 15 Exchange Place, Jersey City, New Jersey, as trustee, hereinafter called the "trustee," and S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, all of the city, county, and State of New York.

Whereas, by a certain agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between the above-named settlor and said Commercial Trust Company of New Jersey and Clarence L. Myers, trustee, and by an instrument between the same parties dated the 12th day of May, 1920, and by a further instrument between the settlor and said Commercial Trust Company of New Jersey, dated the 3d day of March, 1921, and by a further instrument between the above-named settlor, the said Commercial Trust Company of New Jersey, Louis F. Rothschild, and the said Clarence L. Myers, dated the 5th day of May, 1921, and by a further instrument betwen the above-named settlor and said Commercial Trust Company of New Jersey dated the 16th day of November, 1923, the settlor did create a trust (known as the "Edmond A. Guggenheim trust") of and in certain property, for certain
110 purposes as in said agreement and instruments specified, for the benefit of the certain person or persons therein named; and

Whereas, by the terms of the said trust agreements and instruments certain rights and powers of directing or controlling the

administration of the trust and the management of the trust fund were originally reserved to or retained by the settlor and were later transferred to and assumed by the said Louis F. Rothschild and Clarence L. Myers, who now desire to be relieved of their several duties and responsibilities in the premises and who have requested that they be so relieved; and

Whereas, the said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele have consented to assume the said rights and powers and to act in the place and stead of the said Louis F. Rothschild and Clarence L. Myers in the premises.

Now, therefore, this instrument witnesseth:

That the settlor, by virtue of the power and authority vested in him pursuant to the provisions of the eleventh paragraph of the said trust agreement of the 28th day of June, 1917, as amended by the above-mentioned instruments, does hereby modify and alter the said trust agreements and instruments and the trust existing thereunder, as follows:

111 1. By striking out of the said trust agreement and instruments the provisions thereof whereby the rights and powers of directing or controlling the administration of the said trust and the management of the trust fund were originally reserved to and retained by the settlor during his lifetime and were subsequently transferred to and vested in the said Louis F. Rothschild and Clarence L. Myers, and by vesting the said rights and powers in the said S. R. Guggenheim, Simon Guggenheim, and Albert H. Thiele, severally and respectively. The said trust agreement and instruments, therefore, shall hereafter be deemed and held to confer upon and vest in the said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, severally and respectively, during the life of the settlor, the rights and powers aforesaid to the same extent and with like effect as if the said trust agreement and instruments had originally so provided. The rights and powers herein referred to are those originally reserved to or retained by the settlor under and by virtue of the fifth and seventh articles or subdivisions of the said trust agreement of the 28th day of June, 1917, as heretofore amended, being the same certain rights and powers described in the instrument aforesaid between the settlor, the said Commercial Trust Company of New Jersey, Louis F. Rothschild, and Clarence L. Myers, dated the 5th day of May, 1921, and consisting of rights and powers of directing or controlling the administration of the said trust and the management of the trust fund and the action

112 of the trustees in respect to such administration and management as set forth in the said articles or subdivisions as amended. The said rights and powers may be exercised singly and independently by any one of the persons in whom they are hereby vested, or by any two of said persons jointly, or by all three of said persons jointly. The trustee shall be equally protected in acting in the premises whether the said rights and powers are

exercised by one or more of the said persons. Should it ever transpire that directions given by one of said persons are in conflict with directions on the same subject or in the same manner given by another of said persons, the directions on such subject or in such matter in which any two of said persons concur shall prevail and be followed, provided three of said persons are available, but if only two of said persons are available, or if the trustee is given directions by two of said persons only, then in the event of such conflict, the trustee shall take no action in the premises, unless some action in the judgment of the trustee is necessary or desirable for the preservation or due execution of the trust, and if so necessary or desirable the trustee shall have authority to act in accordance with its best judgment and discretion, such conflicting directions notwithstanding. The said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, by becoming parties to this instrument, each for himself respectively accepts the said rights and powers and agrees and undertakes to use his best judgment and discretion in the exercise of the same. The said Commercial Trust Com-
113 pany of New Jersey, by becoming a party to this instrument, consents to the assumption of the said rights and powers and their exercise by the said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele as in this instrument provided.

2. The right, title, and interest of the trustee, the Commercial Trust Company of New Jersey, in the trust fund and in the properties, interests and securities comprising the same and in the management of the trust fund arising and existing under and by virtue of the said trust agreement of the 28th day of June, 1917, as amended, are hereby in all respects ratified and confirmed, subject to the terms and conditions of the said trust and subject to the exercise by the said S. R. Guggenheim, and/or the said Simon Guggenheim, and/or the said Albert E. Thiele of the rights and powers by this instrument conferred upon them severally and respectively.

3. As to any and all matters in respect to which the said rights and powers hereby transferred and conveyed may be exercised the trustee may request in writing from the said S. R. Guggenheim, the said Simon Guggenheim and the said Albert E. Thiele, or the survivor or survivors of them, by letter addressed to their last known place of residence, written directions as to the action to be taken, and if within a period of thirty (30) days after such request has been mailed the trustee shall not receive such written directions from any one or more of the said persons so addressed, the trustee is authorized and empowered to take such action in the premises as it may deem proper and desirable under the circumstances. The trustee
114 shall be fully protected in taking any action in respect of which the said rights and powers may be exercised which it may have received written directions from the said S. R. Guggenheim, or the said Simon Guggenheim, or the said Albert E. Thiele to take, as fully to all intents and purposes as it would have been protected in like case had such written directions been given by the

settlor under the terms and conditions of the trust as they have heretofore existed. The said S. R. Guggenheim, Simon Guggenheim and Albert E. Thiele, jointly and severally, shall not be or become liable or responsible to any person for any act or omission in respect to the rights and powers herein referred to, or for any other cause, matter or thing arising hereunder, save only in the event of wilful fraud or breach of trust.

In witness whereof, the settlor has hereunto set his hand and seal and the trustee has caused these presents to be signed by its president and its corporate seal to be hereunto affixed and attested by its secretary on the day and year first above written.

MORRIS GUGGENHEIM. [L. S.]

Signed, sealed, and delivered
in the presence of—
J. FISHER ANDERSON.

COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By WM. J. FIELD, *President.*

115 Attest:
WM. V. TOFFEY, *Secretary.*

Witness:
J. FISHER ANDERSON.

S. R. GUGGENHEIM. [L. S.]
SIMON GUGGENHEIM. [L. S.]
ALBERT E. THEILE. [L. S.]

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.]

EBEN C. HASLETT,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personally appeared William V. Toffey who,
116 being by me duly sworn, doth depose and make proof to my satisfactory that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by William J. Field who was at the date of execution thereof the president of the

said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

WM. V. TOFFEY.

Subscribed and sworn to before me the date aforesaid.

[SEAL.] EBEN C. HASLETT,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personally appeared S. R. Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the
117 contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] EBEN C. HASLETT,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personally appeared Simon Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] EBEN C. HASLETT,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personally appeared Albert E. Thiele, who, I am satisfied, is one of the persons named in and who executed the
118 foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] EBEN C. HASLETT,
Notary Public of New Jersey.

Edmond A. Guggenheim trust, Exhibit No. 14

INSTRUMENT made and executed in Jersey City, New Jersey, on the 13th day of July, 1925, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor,"

and Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at No. 15 Exchange Place, Jersey City, New Jersey, as trustee, hereinafter called the "trustee."

Whereas, by a certain trust agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between the above named settlor and said Commercial Trust Company of New Jersey and Clarence L. Meyers, trustee, and by an instrument between the same parties dated the 12th day of May, 1920, and by a further instrument between the settlor and said Commercial Trust Company of New Jersey, dated the 3rd day of March, 1921,
119 and by a further instrument between the above-named settlor, the said Commercial Trust Company of New Jersey, Louis F. Rothschild, and the said Clarence L. Myers, dated the 5th day of May, 1921, and by a further instrument between the above-named settlor and said Commercial Trust Company of New Jersey dated the 16th day of November, 1923, and by a further instrument between the above-named settlor, the said Commercial Trust Company of New Jersey, S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, dated the 13th day of July, 1925, the settlor did create a trust (known as the "Edmond A. Guggenheim trust") of and in certain property, for certain purposes as in said agreement and instrument specified, for the benefit of the certain person or persons therein named; and

Whereas the settlor in the first, second, and eleventh paragraphs of said trust agreement of the 28th day of June, 1917, as amended by the instruments above referred to, reserved certain powers, including powers to control the distribution of the income of the trust and to modify or alter or revoke said trust, and now desires to relinquish and terminate all such powers.

Now, therefore, this agreement witnesseth:

That the settlor, by virtue of the power and authority vested in him pursuant to the provisions of the said eleventh paragraph of the said trust agreement of the 28th day of June, 1917, as
120 amended by the above-mentioned instruments, does hereby modify and alter the said trust agreement and instruments and the trust existing thereunder as follows:

1. By modifying and altering the terms and provisions of the first article or subdivision of the said trust agreement of the 28th day of June, 1917, as amended by the instruments of May 12, 1920, and of March 3, 1921, by eliminating therefrom and cancelling the sentence in the instrument of May 12, 1920, reading as follows:

"In respect to the accumulated income of the trust fund at any time accrued and received thereon and held by the trustees as an addition to and part of the principal of the trust fund, whether in the shape of money or other funds or in the shape of securities or other property, and either before or after investment or re-invest-

ment, the settlor may at any time and from time to time, by directions in writing signed by him and delivered to the trustees, cause and require such accumulated income, or any part or parts thereof, to be assigned, transferred, conveyed, paid over, surrendered and delivered by the trustees to the beneficiary of the said trust, Edmond A. Guggenheim, absolutely and free of all restrictions."

and by eliminating therefrom and cancelling the sentence in the instrument of March 3, 1921, reading as follows:

121 "The settlor may at any time, and from time to time, by directions in writing delivered to the trustee, increase the aggregate amount of payments to be made annually to the said Edmond A. Guggenheim above the yearly rate or sum herebefore specified, to any extent not exceeding the full amount of the annual net income of the trust fund; and the settlor may likewise at any time, and from time to time, by directions in writing delivered to the trustee, decrease the aggregate amount of the payments to be made annually to the said Edmond A. Guggenheim below any amount to which such payments may previously have been increased as herein provided, to any extent down to the amount of such payments first hereinbefore specified."

2. By modifying or altering the terms and provisions of the second article or subdivision of the said trust agreement of the 28th day of June, 1917, as amended by the instrument of March 3, 1921, by eliminating therefrom and cancelling the sentence reading as follows:

"In respect to the accumulated income of the trust fund at any time accrued and received thereon and held by the trustee as an addition to and part of the principal of the trust fund, whether in the shape of money or other funds or in the shape of securities or other property, and either before or after investment or re-

122 investment, the settlor may at any time and from time to time, by directions in writing signed by him and delivered to the trustee, cause and require such accumulated income, or any part or parts thereof, to be assigned, transferred, conveyed, paid over, surrendered and delivered by the trustee to the said Edmond A. Guggenheim and the said Natalie Guggenheim, or either of them, absolutely and free of all restrictions."

3. By modifying and altering the terms and provisions of the said trust argreement of the 28th day of June, 1917, as amended by the instrument of March 3, 1921, by eliminating therefrom and cancelling the eleventh article or subdivision thereof.

4. The rights and powers in the trust fund and in the properties, interests and securities comprising the same and in the management of the trust fund vested in S. R. Guggenheim, Simon Guggenheim and Albert E. Thiele, by the instrument executed on the 13th day of July, 1925, are hereby in all respects ratified and confirmed, sub-

ject to the terms and conditions of the said trust agreement and the instruments modifying and amending the same.

In witness whereof, the settlor has hereunto set his hand and seal and the trustee has caused these presents to be signed by its president and its corporate seal to be hereunto affixed and attested
123 by its secretary on the day and year first above written.

Signed, sealed, and delivered
in the presence of—

MORRIS GUGGENHEIM, [L. S.]

J. FISHER ANDERSON.

COMMERCIAL TRUST COMPANY
OF NEW JERSEY.
WILLIAM J. FIELD, *President.*

Attest:
WM. V. TOFFEY, *Secretary.*
[SEAL.]

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, A. D. 1925, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.]

EBEN C. HASLETT,
Notary Public of New Jersey.

124 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, A. D. 1925, before me the subscriber personally appeared William V. Toffey who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by William J. Field, who was at the date of execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

WM. V. TOFFEY.

Subscribed and sworn to before me the date aforesaid.

[SEAL.]

EBEN C. HASLETT,
Notary Public of New Jersey.

125 *Lucile G. Gimbel trust, Exhibit No. 15*

TRUST AGREEMENT, made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," party of the first part, and Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having its main office and place of business at number 15 Exchange Place, Jersey City, New Jersey, hereinafter called the "corporate trustee," and Clarence L. Myers, a resident of Red Bank, county of Monmouth, and State of New Jersey, hereinafter called the "individual trustee," the corporate trustee and the individual trustee being hereinafter called the "trustees," parties of the second part.

Whereas, the settlor desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, therefore, this agreement witnesseth:

That, in consideration of the premises, the mutual covenants herein contained and other good and valuable considerations, and of the sum of one dollar ($1) to him in hand paid by the trustees, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the settlor has given, granted, conveyed, assigned, transferred, set over, and delivered, and by
126 these presents does give, grant, convey, assign, transfer, set over, and deliver unto the trustees, their successors and assigns, the following-described properties, interests, and securities, to wit:

One million two hundred ninety thousand dollars ($1,290,000) face amount part-paid receipts for subscriptions to Chile Copper Company collateral trust 6% gold bonds, series A, numbered X–132 to X–135, inclusive, for $10,000 each; L–108 to L–122, inclusive, for $50,000 each; and L–250 to L–259, inclusive, for $50,000, each;

Twenty-five hundred (2,500) shares stock of New York & Honduras Rosario Mining Company;

Three thousand and twenty-five (3,025) shares stock of Bunker Hill & Sullivan Mining and Concentrating Company;

Four thousand (4,000) shares stock of Utah Copper Company;

Nine thousand five hundred (9,500) shares common stock American Smelting and Refining Company;

One hundred thousand (100,000) shares stock of Chile Copper Company;

Eighty-seven thousand dollars ($87,000) par value Braden Copper Mines Company 15-year 6% sinking-fund gold bonds, principal due February 1, 1931;

Five hundred and fifty-three thousand dollars ($553,000) par value Chile Copper Company collateral trust 7% 10-year convertible coupon gold bonds, principal due May 1, 1923;

127 Together with all the right, title, interest, and estate of the settlor therein or thereto; all of which said properties, in-

terests, and securities hereinafter collectively referred to as the "trust fund" or "original trust fund" have this day been delivered in person by the settlor into the hands of the corporate trustee at its offices aforesaid in Jersey City, New Jersey, the receipt whereof by the corporate trustee is hereby acknowledged.

To have and to hold all and singular the above granted and described properties, interests, and securities unto the said trustees, their successors and assigns, in trust for and upon the following uses and purposes and subject to the terms, conditions, powers, and agreements hereinafter set forth:

First. In the manner hereinafter specified, to receive, hold, manage, sell, exchange, invest, reinvest, deal with, and dispose of the same and every part thereof, and to collect, recover, and receive the rents, issues, interest, income, and profits thereof, hereinafter called the "income" thereof; and to pay such income to the extent of thirty thousand dollars ($30,000) thereof per annum to the daughter of the settlor, Lucile G. Gimbel, hereinafter called the "beneficiary," in quarterly installments, payable respectively on the first day of January, April, July, and October in each and every year until the expiration of ten (10) years from the date of this instrument,
128 or until the earlier termination of the trust; and to invest the remainder of all such income (less any amount or amounts thereof which the trustees may be required to deduct and *and* withhold therefrom and to pay under any present or future income tax law or other law, and after deducting therefrom the commissions of the trustees hereinafter provided for and the proper and necessary expenses of administering the trust) in other property or securities, which shall be when acquired added to the property or securities already held by the trustees hereunder and subject to the same terms and conditions of trust as an integral part of the trust fund. The settlor may at any time, and from time to time, by directions in writing delivered to the trustees, increase the aggregate amount of payments to be made annually to the beneficiary above the yearly rate or sum hereinbefore specified, to any extent not exceeding the full amount of the annual net income of the trust fund; and the settlor may likewise at any time, and from time to time, by directions in writing delivered to the trustees, decrease the aggregate amount of the payments to be made annually to the beneficiary below any amount to which such payments may previously have been increased as herein provided, to any extent down to the amount of such payments first hereinbefore specified.

Second. At the expiration of ten (10) years from the date of this instrument (unless the trust created hereby should be sooner revoked as hereinafter provided) to assign, transfer, con-
129 vey, pay over, surrender, and deliver the said trust fund, and all the property, money, or securities then comprising the same, together with all income, gains, and profits thereof in the hands of the trustees, to the said beneficiary absolutely and free of all

restrictions. In the event of the death of the beneficiary prior to the expiration of ten (10) years from the date hereof, the trustees thenceforth until the termination of the trust shall hold, administer, and apply the trust fund and the income thereof in trust for the use, benefit, and advantage of the child or children of the beneficiary her surviving, as follows: (a) If there be more than one such child so surviving, the trust fund shall be held for the use, benefit, and advantage of all such children alike, and each such child shall have the same beneficial interest in the trust fund and shall be entitled to an equal distributive share of the same; if there be but one such child so surviving, the trust fund shall be held for the use, benefit, and advantage of that child, and he or she shall have the sole beneficial interest in the trust fund and shall be entitled to the whole thereof on distribution; (b) out of the income of the trust fund (less the deductions hereinbefore specified), the trustees shall pay to the guardian or guardians of each such child, if there be more than one, or of the one child, if there be no more, such periodical allowance as in the judgment of such guardian or guardians shall be sufficient and appropriate adequately to provide for the maintenance, care, education, and personal and social needs and require-
130 ments of such child, due consideration being given to the position, means, and habit and mode of life of such child, until such child shall have arrived at the age of twenty-one (21) years, the balance of such income over and above the amount of such allowance to be invested, reinvested, accumulated, and added to the principal of the trust fund in the manner herein elsewhere specified; (c) when any such child shall have arrived at the age of twenty-one (21) years, if there be more than one such child, the income of the trust fund less the deductions specified shall be equally apportioned between all such children, and one full equal portion of such income shall thereafter be paid to the child so arriving at the age of twenty-one (21) years, and the other full equal portions shall be paid to the others of such children, respectively, as and when they severally arrive at the said age until the expiration of twenty (20) years from the date of the death of the beneficiary, but if there be but one such child, the entire income of the trust fund (less the deductions specified) shall thereafter be paid to that child until the expiration of twenty (20) years from the date of the death of the beneficiary; (d) at the expiration of twenty (20) years from the last mentioned date, the trust fund and all accumulations of income thereon shall be divided into as many equal portions as there were children of the beneficiary surviving her at the time of her death, if there were more than one, and one such equal portion shall be paid over, surrendered, and delivered to each such child then living, but if there were but one such
131 child so surviving, the entire trust fund and all accumulations thereon shall be paid over, surrendered, and delivered to that child if then living; (e) if at any time between the date of

the death of the beneficiary and the expiration of the said twenty (20) years any such child shall die, the trust fund and all accumulations thereon shall nevertheless remain intact and shall not be divided as aforesaid until the expiration of said twenty (20) years, at which time the portion thereof to which such child would then have been entitled had he or she lived shall be paid over, surrendered, and delivered or otherwise distributed as he or she may have by his or her last will directed, or, if there be no such last will, as the laws of his or her domicile may prescribe in case of intestacy.

In the event of the death of the beneficiary prior to the expiration of ten (10) years from the date hereof leaving no children her surviving, the trust fund and all accumulations thereon shall thereupon be paid over, surrendered, and delivered to the trustee of a certain trust created by the settlor herein for the use and benefit of his son, Edmond A. Guggenheim, by a certain agreement of trust between the settlor and the Commercial Trust Company of New Jersey and Clarence L. Myers, dated as of June 28, 1917, and shall be added to, incorporated in, and become a part of the trust fund created by the agreement of trust last mentioned.

Third. The settlor hereby expressly reserves to himself the
132 privilege of increasing the principal of the trust fund, from time to time, by adding thereto properties, interests, and securities, which the trustees shall receive, hold, manage, sell, exchange, invest and reinvest, deal with and dispose of in the same manner as herein specified in respect of the properties, interests, and securities forming the original trust fund.

Fourth. The trust fund created hereby shall comprise the properties, interests, and securities hereinbefore described in their present form, or in any substituted form resulting from the sale or exchange of the same or otherwise, and also such additional or other properties, interests, or securities as may from time to time be added to the trust fund by the settlor, or substituted by the settlor for properties or securities previously comprised in the trust fund, or as may from time to time be acquired by the trustees through investments or reinvestments for the trust fund made in the manner herein provided, of the proceeds of any sales of trust property, or of the income of the trust fund or any part of such income, or of any other monies belonging, appertaining, or devoted to the uses of the trust.

Fifth. Sales, exchanges, and substitutions of property or securities comprising the trust fund, and investments and reinvestments for the trust fund, and of income subject to investment or reinvestment, shall be made, if, when and as directed in writing by the settlor, to whom alone is reserved the right of deciding upon and author-
133 izing the making of any and all such changes in the trust fund caused by sales, exchanges and substitutions of property or securities comprising the trust fund and investments and reinvestments of the trust fund and of income subject to investment or reinvestment, and the right of causing such changes to be effectuated;

and the trustees shall be fully protected in making any such sales, exchanges, substitutions, investments, and reinvestments as shall be directed in writing by the settlor, and shall not be liable or responsible in any way for depreciation or loss incurred by reason of any such sales, exchanges, substitutions, investments, or reinvestments so made. No purchaser upon any sale by the trustees shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the authority, validity, expediency, or propriety of any such sale.

Sixth. The trustees shall, if requested by the settlor in writing so to do, cause the securities which may, from time to time, comprise the trust fund, or any part thereof, to be registered in their names as trustees hereunder, in which case the properties or securities shall stand in the name of "Commercial Trust Company of New Jersey and Clarence L. Myers, trustees under the trust agreement of Morris Guggenheim for Lucile G. Gimbel, dated the 28th day of June, 1917," or in such other name as the settlor may select.

Seventh. Subject in each and every instance to the written approval and directions of the settlor, the trustees are author-
134 ized and empowered to do and perform the following: (1) To vote in person or by proxy upon all stocks and other securities held by it; (2) to exchange the securities of any corporation or company for other securities issued by the same, or by any other corporation or company; (3) to consent to the reorganization, consolidation or merger of any corporation or company, or to consent to the sale or lease of its property, or any portion thereof, to any person, corporation or company, or to the acquisition through purchase or lease from any person, corporation or company of his or its property or any portion thereof, and upon such reorganization, consolidation, merger, sale, purchase or lease to exchange the securities held by it for the securities issued in connection therewith; (4) to pay all assessments, subscriptions and other sums of money necessary to the protection of its interests as holder of any stocks, bonds or other securities of any corporation or company; (5) to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities; (6) to take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefor.

In the event that the settlor shall have omitted to give any written directions, the trustees may request in writing from the settlor such written directions as to the action to be taken with regard to any of the matters set forth in this article, and if the settlor shall neglect or refuse or be unable to give such written directions
135 for a period of thirty (30) days after such request, the trustees are hereby authorized and empowered to take such action as they may deem proper and desirable with regard to such matters.

Eighth. In case of securities taken or purchased for the trust fund at a premium, the trustees shall not be required to set aside any

part of the income thereof as a sinking fund to retire or absorb such premium, or to make any other provision for possible depreciation in the value of the securities constituting the trust fund by reason of the approaching maturity of said securities or otherwise.

Ninth. The trustees are authorized and empowered to pay out of the income received from the trust fund any and all taxes which may become properly payable, from time to time, under the laws of the United States, or of any State, county, or municipality in respect of said trust property, or in respect of any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws. All taxes and all expenses connected with the administration of the said trust, including the trustees' commissions, payable out of income, shall be deducted from and paid out of the income of the trust fund.

Tenth. The settlor covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances, or other instruments as the trustees may deem
136 requisite or necessary to effectuate the purpose hereof.

Eleventh. Anything herein to the contrary notwithstanding, the settlor may, from time to time during the continuance of the trust, by instrument in writing executed and acknowledged in the manner required for a deed of real property, so as to enable it to be recorded in the State of New Jersey, and delivered to the trustees, or their successors, modify or alter in any way or revoke in whole or in part this agreement and the trust then existing, and the estates and interests in property hereby created and provided for, and in case of such modification, alteration, or revocation said instrument shall direct the disposition to be made of the trust fund, or the part of the trust fund affected by such modification, alteration, or revocation, and upon delivery of such instrument to the trustees, or their successors, said instrument shall take effect according to its provisions, and the trustees, or their successors, shall make, execute, and deliver all such documents, and make such conveyances, transfers, and deliveries of property, rights, interests, and securities as may be necessary or proper in order to carry the same into effect, and no one shall have any right, interest, or estate under this agreement, except subject to and in accordance with such modification, alteration, or revocation thereof; provided, however, that no power of revocation in this agreement reserved or contained shall affect the income at any time received or accrued upon the trust fund, or upon
137 the properties, interests or securities originally or at any time comprised therein, or affect any accumulations or investments of such income; but the legal ownership and title of the trustees and the beneficial ownership and title of the beneficiary, or beneficiaries, in and to such income shall be and remain absolute and indefeasible, subject only to such directions as the settlor may give to the trustees under the powers herein reserved or contained, as to the respective proportions of income to be paid over or accumu-

lated, or as to the investment or reinvestment of accumulations or varying the respective shares of the beneficiaries in the income to be paid over or accumulated.

Twelfth. The coporate trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one-half of one per cent (.0½%) per annum upon all incomes received under the trust, and is hereby authorized to deduct such commission from the said income. In case of the termination of the trust by revocation as hereinbefore provided prior to the expiration of five (5) years from the date hereof, the corporate trustee shall be entitled to receive, in addition to the aforesaid commission theretofore received by it, a commission of ten thousand dollars ($10,000.). In case of the termination of the trust otherwise than by revocation, the corporate trustee shall be entitled to no other or further commission than herein first specified. The individual trustee shall be entitled to receive as compensation for his
138 services a commission at the rate of five hundred dollars ($500.) per annum, payable in semi-annual installments on the first day of January and July in each year, while acting as trustee hereunder, and the corporate trustee is hereby authorized to deduct such commission from the said income.

Thirteenth. The trustees by joining in the execution of this instrument signify their acceptance of the trust herein created, and covenant and agree with the settlor that they will faithfully perfrom the duties therof according to the best of their skill, knowledge and ability, but the trustees shall not be responsible for any action taken by them in the administration of the trust if taken in accordance herewith or with any written directions to them by the settlor, or for any mistake in judgment or decrease in value of the trust fund.

Fourteenth. This agreement and the trust created by this agreement shall be performed, executed and administered in the State of New Jersey, and the laws of the State of New Jersey shall govern the validity, interpretation, administration and enforcement thereof. The properties, interests and securities comprising the trust fund, together with the income thereof, shall at all times until the termination of the trust be held, kept and retained by the trustees in the State of New Jersey. Upon the termination of the trust, the trust fund and its accumulations, and the income thereof, shall be conveyed, delivered and paid over in the State of New Jersey to
139 the person or persons who shall then be entitled to take and receive the same as herein provided, or to the duly authorized agent, attorney or representative of such person or persons.

Fifteenth. The individual trustee may at any time resign his trust hereunder by a writing signed by him and delivered to the corporate trustee, accompanied by a proper transfer and release of his title to and interest in the trust fund and properties. The settlor may at any time dispense with an individual trustee in the performance or execution of the trust, or substitute another person for the person

originally named as individual trustee hereunder, by a writing signed in duplicate by the settlor and delivered to the individual trustee and the corporate trustee; and upon delivery of such writing, the trusteeship of the person so originally named shall be rendered vacant. In the event of the death, resignation, disability or substitution of the individual trustee, the trusteeship thereby rendered vacant may be filled by the appointment in writing of the settlor delivered to the corporate trustee, and thereupon the person so designated upon his written acceptance of the appointment duly acknowledged and deposited with the corporate trustee shall become vested with all the rights, powers, duties, and obligations of the individual trustee originally named in this agreement; if, however, the death, resignation, or disability of the individual trustee occur after the demise of the settlor, such vacant trusteeship may be filled by appointment by a court of the State of New Jersey of competent jurisdiction.

140 Sixteenth. The corporate trustee shall have the custody of the trust fund and the accumulations thereon, and may receive, collect, sue and receipt for, and disburse and apply the income of the trust fund, as well as do and perform all ministerial acts and duties involved in the administration of the trust, including the making, signing and indorsing of checks, drafts, bills, notes, and other commercial paper, and the depositing of monies, independently of the individual trustee, and in its own name, without the joint action of the individual trustee in so doing; provided, however, that access to the vault or place of safe deposit wherein the properties and securities comprising the trust fund are kept shall be had, and the depositing therein and withdrawal therefrom of any such properties or securities shall be done, jointly by an officer of the corporate trustee and the individual trustee and in the presence of both; that the assignment, transfer, sale, or exchange of any stocks, bonds or other corporate or other securities shall be executed and effected by the joint action of both trustees and in the names of both; and that all matters connected with the execution of the trust calling for the exercise of judgment and discretion shall likewise require the concurrence and joint action of both trustees. Notwithstanding, however, the death, resignation, or disability of the individual trustee, the settlor may at his option, or the court aforesaid after the death of the settlor may in its discretion, dispense with an individual

141 trustee in the performance and execution of the trust by omitting or failing to appoint such trustee, in which case, as well as during any interval pending such appointment, the corporate trustee shall be clothed with and shall be empowered to exercise all the rights and powers vested in the trustees under this agreement, to the same extent and with the like effects as if the corporate trustee had originally been made the sole trustee hereunder, and all provisions herein relative to the action of the individual trustee hereunder shall be held for nought.

Seventeenth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

Eighteenth. This agreement, made as of the same date as a prior trust agreement of the same import, between the same parties and in the interest of the same beneficiary, is made for the purpose of embodying in one document the said prior agreement, and certain further stipulations affecting the terms of the trust now evidenced by separate supplemental instruments, and for the further purpose of more clearly defining the intent of the Settlor, and shall apply to and govern the said trust and the execution and administration thereof as if the same had been originally created hereby; to which end the said prior trust agreement and supplemental instruments shall be, and hereby are, superseded by this agreement, and shall be and are of no further force and effect; provided, however, that
142 all acts and things hitherto done or performed by any of the parties hereto under and by virtue of the said prior trust agreements and of agreements supplemental thereto are hereby ratified, approved and confirmed, and shall be considered and held as having been done and performed under and pursuant to this agreement. In furtherance hereof, the said prior trust agreement made as of the 28th day of June, 1917, and supplemental instruments have coincidentally with the execution and delivery of this agreement been marked "Superseded and cancelled."

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof, the settlor has hereunto set his hand and seal, and the corporate trustee has caused these presents to be signed by its president, and its corporate seal to be hereunto affixed and attested by its secretary, and the individual trustee has hereunto set his hand and seal, as of the day and year first above written.

Signed, sealed, and delivered
in the presence of—
W. B. F. VEYSEY.
W. B. F. VEYSEY.

MORRIS GUGGENHEIM. [SEAL.]
CLARENCE L. MYERS. [SEAL.]
COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*

Attest:
J. S. PERKINS, *Secretary.*

143 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 1st day of April, A. D. 1918, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and

delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

J. FISHER ANDERSON,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 1st day of April, A. D. 1918, before me the subscriber personally appeared Jay S. Perkins, who, being by me duly sworn, doth deposes and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument, that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by J. W. Harden-
144 bergh who was at the date of execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

J. S. PERKINS.

Subscribed and sworn to before me the date aforesaid.

J. FISHER ANDERSON,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 1st day of April, A. D. 1918, before me the subscriber personally appeared Clarence L. Myers, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did ackowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

J. FISHER ANDERSON,
Master in Chancery of New Jersey.

145 *Lucile G. Gimbel trust, Exhibit No. 16*

THIS INSTRUMENT, made and executed in Jersey City, New Jersey, on the 12th day of May, 1920, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," and Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at number 15 Exchange Place, Jersey City, New Jersey, as trustee, and Clarence L. Myers, a resident of Red Bank, county of Monmouth, State of New Jersey, as trustee, hereinafter called the "trustee."

Whereas, by a certain trust agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between the above-named settlor and the above-named trustees, the settlor did create a

trust of and in certain property and for certain purposes as in the said agreement specified, for the benefit of the certain person or persons therein named; and

Whereas, the settlor, pursuant to the power reserved to him in and by the eleventh paragraph of the said trust agreement of the 28th day of June, 1917, desires to modify and amend the said trust agreement and the trust as it now exists thereunder.

Now, therefore, this instrument witnesseth:

That the settlor, by virtue of the power and authority vested
146 in him pursuant to the provisions of the said eleventh paragraph of the said trust agreement of the 28th day of June, 1917, does hereby modify and amend the said trust agreement and the trust existing thereunder by incorporating in the said trust agreement, as an addition to the first paragraph thereof and as a further term or condition of the said trust, the following provision:

"In respect to the accumulated income of the trust fund at any time accrued and received thereon and held by the trustees as an addition to and part of the principal of the trust fund, whether in the shape of money or other funds or in the shape of securities or other property, and either before or after investment or reinvestment, the settlor may at any time and from time to time, by directions in writing signed by him and delivered to the trustees, cause and require such accumulated income, or any part or parts thereof, to be assigned, transferred, conveyed, paid over, surrendered and delivered by the trustees to the beneficiary of the said trust, Lucile G. Gimbel, absolutely and free of all restrictions."

In witness whereof, the settlor has hereunto set his hand and seal, and the corporate trustee has caused these presents to be signed by its president and its corporate seal to be hereunto affixed and attested by its secretary, and the individual trustee has hereunto set
147 his hand and seal, on the day and year first above written.

Signed, sealed, and delivered
in the presence of—
WILLARD C. FISK.

MORRIS GUGGENHEIM. [SEAL.]
CLARENCE L. MYERS. [SEAL.]
COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*

Attest:
J. S. PERKINS, *Secretary.*
[SEAL.]

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 12th day of May, A. D. 1920, before me the subscribed personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed

the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed,
148 and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

WILLARD C. FISK,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 12th day of May, A. D. 1920, before me the subscriber personally appeared Jay S. Perkins, who, being by me duly sworn, doth deposes and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company that the said seal was so affixed thereto and the said instrument signed and delivered by John W. Hardenbergh, who was at the date of the execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

JAY S. PERKINS.

Subscribed and sworn to before me the date aforesaid.

WILLARD C. FISK,
Master in Chancery of New Jersey.

149 STATE OF NEW JERSEY,
County of Hudson, *ss:*

Be it remembered that, on this 12th day of May, A. D. 1920, before me the subscribed personally appeared Clarence L. Myers, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

WILLARD C. FISK,
Master in Chancery of New Jersey.

Lucile G. Gimbel trust, Exhibit No. 17

Jersey City, N. J., March 2, 1921.

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
15 Exchange Place, Jersey City, N. J.

Mr. MORRIS GUGGENHEIM,
15 Exchange Place, Jersey City, N. J.

GENTLEMEN: I hereby tender my resignation as individual
150 trustee of the trust for the benefit of Lucile C. Gimbel, existing by virtue of the trust agreement dated as of the 28th day

of June, 1917, between yourselves and the undersigned and of any agreements or instruments amendatory thereof or supplementary thereto; this resignation to take effect immediately upon its acknowledgement by you.

As provided in article fifteenth of the trust agreement of June 28, 1917, I enclose herewith a transfer and release of my title to and interest in the trust fund and properties.

Very truly yours, CLARENCE L. MYERS.

Lucile G. Gimbel trust, Exhibit No. 18

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Clarence L. Myers, the person named as individual trustee in a certain trust agreement dated as of the 28th day of June, 1917, between Morris Guggenheim and Commercial Trust Company of New Jersey, corporate trustee, and Clarence L. Myers, of Red Bank, county of Monmouth, State of New Jersey, as individual trustee, creating a certain trust for the benefit of Lucile G. Gimbel, and in certain agreements or instruments amendatory thereof or supplementary thereto, in consideration of one dollar lawful money of the United States to him in hand paid before the sealing and delivery of these
151 presents, the receipt whereof is hereby acknowledged, has sold, assigned, transferred, set over, released, surrendered, and delivered, and by these presents does sell, assign, transfer, set over, release, surrender, and deliver, unto Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, as trustee under the trust agreement aforesaid and the amendments thereof and supplements thereto, all his right, title, and interest in and to the trust fund and properties comprised in the said trust and all his right, title, and interest in, to and under the said trust agreement and the amendments thereof and supplements thereto, to have and to hold unto the said Commercial Trust Company of New Jersey, as trustee, as aforesaid.

In witness whereof, the said Clarence L. Myers has signed, sealed, and delivered these presents in Jersey City, New Jersey, on this 3rd day of March, 1921.

CLARENCE L. MYERS. [SEAL.]

Witness:
WM. V. TOFFEY.

List of securities held by Commercial Trust Company of New Jersey and Clarence L. Myers, trustees under trust agreement of Morris Guggenheim for Lucile G. Gimbel, dated the 28th day of June, 1917, at the close of business March 3rd, 1921:

152 2,500 shares New York and Honduras Rosario Mining Company.
3,025 " Bunker Hill & Sullivan Mining & Concentrating Co.

4,000	"		Utah Copper Corporation.
135,300	"		Chile Copper Co.
$509,500	par	value	Chile Copper Co. coll. trust 7% gold bonds.
1,290,000	"	"	Chile Copper Co. coll. trust, series A, 6% bonds.
35,000	"	"	Kennecott Copper Corporation 10-year gold bonds.
182,000	"	"	United States of America Victory L. L. 4¾% notes.
45,000	"	"	American Tel. & Tel. Company 3-year gold notes.

COMMERCIAL TRUST COMPANY,
OF NEW JERSEY,
By J. S. PERKINS, *V. P.*,
CLARENCE L. MEYERS,
Trustees under the Trust Agreement of Morris Guggenheim for Lucile G. Gimbel, Dated the 28th day of June, 1917.

Attest correct:
GEO. LETTERHOUSE.

153 *Lucile G. Gimbel trust, Exhibit No. 19*

JERSEY CITY, N. J., *March 2, 1921.*

Mr. CLARENCE L. MYERS,
15 Exchange Place, Jersey City, N. J.

DEAR SIR: Receipt is hereby acknowledged of your letter of March 2nd, 1921, addressed to the undersigned, tendering your resignation as individual trustee of the trust for the benefit of Lucile G. Gimbel, existing by virtue of the trust agreement dated as of the 28th day of June, 1917, between yourself and the undersigned, and of any agreements or instruments amendatory thereof or supplementary thereto. Receipt is also acknowledged of the transfer and release in favor of the Commercial Trust Company of New Jersey of your title to and interest in the trust fund and properties.

Since your resignation was made effective upon its acknowledgment by the undersigned, this letter of acknowledgment will serve as evidence of the fact that your resignation became effective on the date hereof.

Very truly yours,

MORRIS GUGGENHEIM.
COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*

154 *Lucile G. Gimbel trust, Exhibit No. 20*

Murry Guggenheim, 120 Broadway, New York.

JERSEY CITY, N. J., *March 2, 1921.*

COMMERCIAL TRUST COMPANY OF NEW JERSEY,
15 Exchange Place, Jersey City, N. J.
Mr. CLARENCE L. MYERS,
15 Exchange Place, Jersey City, N. J.

GENTLEMEN: Referring to the trust agreement dated as of the 28th day of June, 1917, between yourself and the undersigned, creating a trust for the benefit of Lucile G. Gimbel, and to the instruments or agreements amendatory thereof or supplementary thereto, and in view of the resignation of Clarence L. Myers as individual trustee of the said trust under the said agreement and the amendments thereof and supplements thereto this day tendered, please be advised that, as authorized by the fifteenth article of the said trust agreement, an individual trustee is hereby dispensed with in the performance and execution of the said trust.

Signed and delivered in duplicate.

Very truly yours,

MORRIS GUGGENHEIM.

155 *Lucile G. Gimbel trust, Exhibit No. 21*

THIS INSTRUMENT, made and executed in Jersey City, New Jersey, on the 3rd day of March, 1921, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," and Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at number 15 Exchange Place, Jersey City, New Jersey, as trustee, hereinafter called the "trustee."

Whereas, by a certain trust agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between the above-named settlor and the said Commercial Trust Company of New Jersey and Clarence L. Myers, trustees, and by an instrument between the same parties, dated the 12th day of May, 1920, supplementary to and amendatory of the said trust agreement, the settlor did create a trust of and in certain property, for certain purposes as in the said agreement and instrument specified, for the benefit of the certain person or persons therein named; and

Whereas, the settlor, pursuant to the power reserved to him in and by the eleventh paragraph of the said trust agreement of the 28th day of June, 1917, desires to modify and alter the terms and provisions of the said trust agreement as amended and the terms and conditions of the said trust so created thereunder.

156 Now, therefore, this instrument witnesseth:

That the settlor, by virtue of the power and authority vested in him pursuant to the provisions of the said eleventh paragraph of

the said trust agreement of the 28th day of June, 1917, does hereby modify and alter the terms and provisions of the said trust agreement and of the said instrument of the 12th day of May, 1920, and the terms and conditions of the trust existing thereunder, as follows:

1. By modifying and altering the terms and provisions of the first article or subdivision of the said trust agreement of the 28 day of June, 1917, so that the same shall read as follows:

"First. In the manner hereinafter specified, to receive, hold, manage, sell, exchange, invest, reinvest, deal with, and dispose of the same and every part thereof, and to collect, recover and receive the rents, issues, interest, income and profits thereof, hereinafter called the 'income' thereof; and to pay such income to the extent of thirty thousand dollars ($30,000) thereof per annum to the daughter of the settlor, Lucile, G. Gimble, in quarterly installments, payable, respectively, on the first day of January, April, July and October in each and every year for and during the natural life of the settlor, and to invest the remainder of all such income (less any amount or
157 amounts thereof which the trustee may be required to deduct and withhold therefrom and to pay under any present or future income tax law or other law, and after deducting therefrom the commissions of the trustee hereinafter provided for and the proper and necessary expenses of administering the trust) in other property or securities, which shall be when acquired added to the property or securities already held by the trustee hereunder and subject to the same terms and conditions of trust as an integral part of the trust fund; and from and after the death of the settlor, to pay all such income thereafter accruing (less the deductions hereinbefore specified) to the said Lucile G. Gimbel for and during her natural life. The settlor may at any time, and from time to time, by directions in writing delivered to the trustee, increase the aggregate amount of payments to be made annually to the said Lucile G. Gimbel above the yearly rate or sum hereinbefore specified, to any extent not exceeding the full amount of the annual net income of the trust fund; and the settlor may likewise at any time, and from time to time, by directions in writing delivered to the trustee, decrease the aggregate amount of the payments to be made annually to the said Lucile G. Gimbel below any amount to which such payments may previously have been increased as herein provided, to any extent down to the amount of such payments first hereinbefore specified."

158 2. By modifying and altering the terms and provisions of the second article or subdivision of the said trust agreement of the 28th day of June, 1917, so that the same shall read as follows:

"Second. Upon the death of the said Lucile G. Gimbel without issue her surviving, but leaving her surviving the granddaughter of the settlor, the niece of the said Lucile G. Gimbel, Natalie Guggenheim, the income of the trust fund shall be invested, reinvested, accumulated and added to the principal of the trust fund until the said

Natalie Guggenheim shall have arrived at the age of twenty-one years, and when she shall have arrived at the age of twenty-one years the entire net income of the trust fund thereafter accruing shall be paid over to the said Natalie Guggenheim for and during her natural life; and upon the death of the said Natalie Guggenheim the said trust fund and all the property, money and securities then comprising the same, together with all income, gains and profits thereof and all accumulations thereon in the hands of the trustee, shall be paid over, surrendered and delivered or otherwise distributed as she, the said Natalie Guggenheim, may have by her last will duly and finally admitted to probate, directed and appointed, or if there be no such will the same shall be paid over, surrendered and delivered to the administrator or administrators of the said Natalie
159 Guggenheim to be by such administrator or administrators disposed of and distributed as the laws of her domicile may prescribe in the case of her intestacy, and upon such payment, surrender and delivery the trustee shall be discharged of all further duties and obligations in the premises. Upon the death of the said Lucile G. Gimbel leaving her surviving a child or children or descendants of any child or children, or upon the death of the said Lucile G. Gimbel without issue her surviving if the death of the said Natalie Guggenheim shall have previously occurred, in either event the said trust fund and all the property, money and securities then comprising the same, together with all income, gains and profits thereof and all accumulations thereon in the hands of the trustee, shall be paid over, surrendered and delivered or otherwise distributed as she, the said Lucile G. Gimbel, may have by her last will duly and finally admitted to probate directed and appointed, or if there be no such will the said trust fund and the whole thereof shall be paid over, surrendered and delivered to he settlor if he shall then be living, or if he shall then not be living to the wife of the settlor, Leonie Guggenheim, if she shall then be living, or if she shall then not be living to the son of the settlor, Edmond A. Guggenheim, if he shall then be living, or if he shall then not be living to the descendants of
160 the said Edmond A. Guggenheim then living, if any, or if there be no such descendants then living the said trust fund and the whole thereof shall be paid over, surrendered and delivered, absolutely and without restriction to Mount Sinai Hospital of the city of New York, now located at number 1 East One Hundred Street, New York City.

"Out of income of the trust fund available for accumulation as hereinbefore provided the trustee shall pay to Clarence L. Myers, formerly the individual trustee named in the said trust agreement of the 28th day of June, 1917, the sum of five hundred dollars ($500) per annum for and during the three calendar years beginning with the first day of July, 1291, and ending with the thirtieth day of June, 1924 payable semi-annually."

3. By modifying and altering the terms and provisions of the fifth article or subdivision of the said trust agreement of the 28th day of June, 1917, so that the same shall read as follows:

"Fifth. Sales, exchanges and substitutions of property or securities comprising the trust fund, and investments and reinvestments for the trust fund, and of income subject to investment or reinvestment, shall be made in accordance with the best judgment and discretion of the trustee after the death of the settlor, and prior thereto if, when and as directed in writing by the settlor so long as she shall live, to whom alone during his lifetime is reserved the
161 right of deciding upon and authorizing the making of any and all such changes in the trust fund caused by sales, exchange and substitutions of property or securities comprising the trust fund and investments and reinvestments of the trust fund and of income subject to investment or reinvestment, and the right of causing such changes to be effectuated; and the trustee shall be fully protected in making any such sales, exchanges, substitutions, investments and reinvestments as shall be directed in writing by the settlor, and shall not be liable or responsible in any way for depreciation or loss incurred by reason of any such sales, exchanges, substitutions, investments or reinvestments so made. No purchaser upon any sale by the trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the authority, validity, expediency or propriety of any such sale. The trustee, after the death of the settlor, is authorized to retain and hold for the purpose of the trust any and all of the stocks, bonds or other securities comprised in the trust fund at the time of the death of the settlor, including such thereof as may be unproductive of income, or as may be, or may be deemed to be, hazardous or speculative investments, and in case of losses or expense arising from the exercise of the authority hereby conferred upon the trustee, it shall not be held liable therefore.
162 Without intending to control the lawful discretion of the trustee, should circumstances arise after the death of the settlor to make it necessary or desirable in its best judgment to alter the investments comprised in the trust fund, the trustee shall nevertheless understand, from the fact that the stocks, bonds and other securities then comprising the trust fund are included therein, that the settlor believed in their intrinsic and permanent value and would request that the investments represented by such stocks, bonds and securities be not changed except for good and sufficient reason. Investments or reinvestments made by the trustee after the death of the settlor shall be made in such securities or properties as trustees are authorized or permitted to invest in by the laws of the State of New Jersey."

4. By modifying and altering the terms and provisions of the eleventh article or subdivision of the said trust agreement of the 28th day of June, 1917, so that the same shall read as follows:

"Eleventh. Anything herein to the contrary notwithstanding, the settlor, from time to time during the continuance of the trust, by

instrument in writing executed and acknowledged in the manner required for a deed of real property, so as to enable it to be recorded in the State of New Jersey, and delivered to the trustee, or its
163 successor, may modify or alter in any way or revoke in whole or in part this agreement and the trust then existing, and the estates and interests in property hereby created and provided for, and in case of such modification, alteration or revocation said instrument shall direct the disposition to be made of the trust fund, or of the part of the trust fund affected by such modification, alteration or revocation, and upon delivery of such instrument to the trustee, or its successor, said instrument shall take effect according to its provisions, and the trustee, or its successor, shall make, execute and deliver all such documents, and make such conveyances, transfers and deliveries of property, rights, interests and securities as may be necessary or proper in order to carry the same into effect, and no one shall have any right, interest or estate under this agreement, except subject to and in accordance with such modification, alteration or revocation thereof; provided, however, that no power of revocation in this agreement reserved or contained shall affect the income at any time received or accrued upon the trust fund, or upon the properties, interests or securities originally or at any time comprised therein, or affect any accumulations or investments of such income; but the legal ownership and title of the trustee and the beneficial ownership and title of the beneficiary, or beneficiaries, in and to such income shall be and remain absolute and
164 indefeasible, subject only to such directions as the settlor may give to the trustee under the powers herein reserved or contained, as to the respective proportions or income to be paid over or accumulated, or as to the investment or reinvestment of accumulations or varying the respective shares of the beneficiaries in the income to be paid over or accumulated; and provided further, that after the expiration of ten (10) years from the 28th day of June, 1917, no power of revocation in this agreement reserved or contained shall be effective to abrogate the trust, or to destroy the principal or corpus of the trust fund, or to withdraw the properties, interests and securities comprising the trust fund from the operation of the trust (otherwise than by way of exchange, substitution or sale for reinvestments), but the legal ownership and title of the trustee and the beneficial ownership and title of the beneficiaries in and to the said principal or corpus of the trust fund and the properties, interests and securities comprising the same shall be and remain absolute and indefeasible, subject only to such directions as the settlor may give to the trustee, and to such modifications or alterations as the settlor may make in the provisions of the trust, under the powers in this agreement reserved or contained, as to the management of the trust fund, the relative interests of the beneficiaries therein, the respective
165 shares of the beneficiaries, their powers with respect to such shares, the time and manner of making distribution, by way

of advancement or otherwise, of principal or income and as to the making of sales, exchanges and substitutions of property in, and investments and reinvestments for the trust fund."

5. By modifying and altering the terms and provisions of the twelfth article or subdivision of the said trust agreement of the 28th day of June, 1917, so that the same shall read as follows:

"Twelfth. The trustee shall be entitled to receive as compensation for its services in administering the trust during the lifetime of the settlor a commission of two thousand dollars ($2,000) per annum, and, after the death of the settlor, a commission of two thousand five hundred dollars ($2,500) per annum; provided, however, that should the income of the trust fund in any year after the death of the settlor exceed the sum of two hundred and fifty thousand dollars ($250,000), the trustee shall be entitled to receive for such year, as additional compensation, a sum equivalent to one-half of one per centum (½ of 1%) of the amount of such income in excess of the said sum of two hundred and fifty thousand dollars ($250,000). In case of the termination of the trust by revocation as hereinbefore provided prior to the expiration of five (5)
166 years from the date hereof, the trustee shall be entitled to receive, in addition to the aforesaid commission theretofore received by it, a commission of ten thousand dollars ($10,000). In case of the termination of the trust otherwise than by revocation, the trustee shall be entitled to no other or further commission than herein first specified."

6. By modifying and altering the terms and provisions of the said trust agreement of the 28th day of June, 1917, so as to eliminate and cancel the fifteenth article or subdivision thereof, which shall hereafter be disregarded and held for naught.

7. By modifying and altering the terms and provisions of the said trust agreement of the 28th day of June, 1917, including the sixteenth article or subdivision thereof, so as to eliminate and cancel all references in said agreement and in said article or subdivision to the individual trustee, and all provisions in the said agreement and in the said article or subdivision relative to the individual trustee, and to the powers and duties of such trustee shall hereafter be held for naught, an individual trustee having heretofore been dispensed with in the performance of the trust. The word "trustees" wherever it appears in the said trust agreement shall hereafter be read in the singular, as "trustee."

8. The terms and provisions of the said first, second, fifth,
167 eleventh, twelfth, fifteenth, and sixteenth articles or subdivisions, as set forth in the said trust agreement of the 28th day of June, 1917, as amended by the said instrument of the 12th day of May, 1920, shall hereafter be disregarded and held for naught, and the terms and provisions of the said trust agreement and of the said first, second, fifth, eleventh, twelfth, and sixteenth articles or subdivisions thereof as hereby modified and altered and as herein

set forth or amended, shall hereafter govern the administration and execution of the trust.

In witness whereof, the settlor has hereunder set his hand and seal, and the trustee has caused these presents to be signed by its president and its corporate seal to be hereunto affixed and attested by its secretary, on the day and year first above written.

Signed, sealed, and delivered
in the presence of—
WM. V. TOFFEY.

MORRIS GUGGENHEIM. [SEAL.]
COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*

Attest:
R. S. CARMICHAEL, *Secretary.*

168 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that, on this 3rd day of March, 1921, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] WM. V. TOFFEY,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that, on this 3rd day of March, 1921, before me the subscriber personally appeared Robert S. Carmichael, who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by John W. Hardenbergh, who was at the date of execution thereof the president of the
169 said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

R. S. CARMICHAEL.

Subscribed and sworn to before me the date aforesaid.

[SEAL.] WM. V. TOFFEY,
Notary Public of New Jersey.

Lucile G. Gimbel trust, Exhibit No. 22

INSTRUMENT, made and executed in Jersey City, New Jersey, on the 5th day of May, 1921, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," the Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at number 15 Exchange Place, Jersey City, New Jersey, as trustee, hereinafter called the "trustee," and Louis F. Rothschild and Clarence L. Myers, both of the city, county, and State of New York.

Whereas by a certain trust agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between
170 the above-named settlor and the said Commercial Trust Company of New Jersey and Clarence L. Myers, trustees, and by an instrument between the same parties, dated the 12th day of May, 1920, supplementary to and amendatory of the said trust agreement, and by a further instrument between the settlor and the Commercial Trust Company of New Jersey, dated the 3rd day of March, 1921, the settlor did create a trust (known as the Lucile G. Gimbel trust) of and in certain property, for certain purposes as in the said agreement and instruments specified, for the benefit of the certain person or persons therein named; and

Whereas by the terms of the said agreement and instruments (a) the right of deciding upon and authorizing the making of any and all changes in the trust fund caused by sales, exchanges, and substitutions of property or securities comprising the trust fund and investments and reinvestments of the trust fund and of income subject to investment or reinvestment and the right of causing such changes to be effectuated is reserved to the settlor to be exercised by him by directions in writing to the trustee, and (b) the authority and power of the trustee to do and perform the several acts and things enumerated in the seventh article or subdivision of the said trust agreement of the 28th day of June, 1917 (i. e., to vote in person or by proxy upon all stocks; to exchange securities; to consent to the reorganization, consolidation, or merger of any corporation
171 or to the sale or lease of its property; to pay all assessments, subscriptions, or other sums of money necessary to the protection of the trustee as holder of any stocks or other securities; to exercise any option contained in any stocks, bonds, or other securities for the conversion of the same; and to take advantage of any rights to subscribe for additional stocks, bonds, or other securities and to make any and all necessary payments therefor, and the like), are subject in each and every instance to the written approval and direction of the settlor; and

Whereas, the settlor desires to relinquish and divest himself of the said rights and powers so reserved to or retained by him of directing

or controlling the administration of the trust and management of the trust fund and to confer the said rights and powers upon and to vest the same in the said Louis F. Rothschild, in the first instance, and (contingently) upon and in the said Clarence L. Myers, to the end that the said Louis F. Rothschild (and contingently the said Clarence L. Myers) shall be substituted for the settlor as the person by whom the said rights and powers may be exercised; the intention being that, whereas it has been the purpose of the settlor heretofore that the trust estate should have the benefit of the special knowledge, experience, judgment, and discretion of the settlor in respect of the several matters and things to which the said rights and powers relate, it is now the purpose of the settlor that
172 hereafter the trust estate shall have the benefit of the special knowledge, experience, judgment and discretion of the said Louis F. Rothschild (or contingently the said Clarence L. Myers) in respect to the said matters and things;

Now, therefore, this instrument witnesseth:

1. That, in consideration of the premises, the settlor has remised, released, relinquished, granted, bargained, sold, assigned, transferred and set over, and by these presents does remise, release, relinquish, grant, bargain, sell, assign, transfer and set over, unto the said Louis F. Rothschild and the said Clarence L. Myers, severally and respectively but not jointly, all the rights and powers reserved to or retained by him under and by virtue of the fifth and seventh articles or sub-divisions of the said trust agreement of the 28th day of June, 1917, of directing or controlling the administration of the said trust and the management of the trust fund and the action of the said trustee in respect to such administration and management, as set forth in the said articles or sub-divisions as so amended; to have and to hold unto and to the exclusive use of the said Louis F. Rothschild and the said Clarence L. Myers, severally and respectively, for and during the life of the settlor; provided, however, that this transfer and conveyance of the said rights and powers to the said Clarence L. Myers shall take effect, if at all, only upon the death of the said Louis F. Rothschild prior to the death of the settlor, or
173 upon his written refusal to exercise the said rights and powers delivered to the said trustee prior to such death, and not otherwise. The said Louis F. Rothschild and the said Clarence L. Myers by becoming parties to this instrument each for himself respectively accepts this transfer and conveyance of the said rights and powers and agrees and undertakes to use his best judgment and discretion in the exercise of the said rights and powers. The said Commercial Trust Company of New Jersey by becoming a party to this instrument consents to the said transfer and conveyance of the said rights and powers to, and their assumption and exercise by, the said Louis F. Rothschild and the said Clarence L. Myers as in this instrument provided.

2. The right, title and interest of the trustee, the Commercial Trust Company of New Jersey, in the trust fund and in the properties, interests and securities comprising the same, and in the management of the trust fund, arising and existing under and by virtue of the said trust agreement of the 28th day of June, 1917, as supplemented, modified or amended by the said instruments of the 12th day of May, 1920, and the 3rd day of March, 1921, are hereby in all respects ratified and confirmed, subject to the terms and conditions of the said trust and subject to the exercise during the life of the settlor by the said Louis F. Rothschild or the said Clarence L. Myers of the rights and powers by this instrument conferred upon them severally and respectively.

174 3. As to any and all matters in respect to which the said rights and powers hereby transferred and conveyed may be exercised, the trustee may request in writing from the said Louis F. Rothschild (or the said Clarence L. Myers) written directions as to the action to be taken, and if the said Louis F. Rothschild (or the said Clarence L. Myers) shall refuse or neglect or be unable for any reason to give such written directions for a period of thirty days after such request has been mailed to his last known place of residence, the trustee is authorized and empowered to take such action in the premises as it may deem proper and desirable under the circumstances. The trustee shall be fully protected in taking any action in respect of which the said rights and powers may be exercised which it may have received written directions from the said Louis F. Rothschild (or the said Clarence L. Myers) to take, as fully to all intents and purposes as it would have been protected in like case had such written directions been given by the settlor under the terms and conditions of the trust as they have heretofore existed.

4. Nothing in this instrument contained shall be deemed to affect or limit the power of the settlor to modify, alter or revoke the said trust and trust agreement, as said power is reserved to the settlor in the said agreement of the 28th day of June, 1917, and the said instruments supplementary thereto and amendatory thereof.

175 Nor shall anything in this instrument contained, or contained in the said agreement of the 28th day of June, 1917, or the said instruments, supplementary thereto or amendatory thereof, be deemed to affect the power of the settlor, by directions in writing given to the trustee, to alter, define and prescribe the relative interests of the beneficiaries in the trust fund, or the income thereof, their respective shares in the same, their respective powers with respect to such shares, and the time and manner of making distribution to the beneficiaries, or any of them, by way of advancement or otherwise, of principal or income, or both, of the trust fund; which power of the settlor is hereby expressly reaffirmed and reserved.

5. The terms, conditions and provision of the said agreement of the 28th day of June, 1917, as supplemented, amended or modified by the said instruments of the 12th day of May, 1920, and the 3rd

day of March, 1921, in so far as they are inconsistent with the provisions of this instrument, shall be deemed to be hereby altered and modified, in all other respects the said terms, conditions and provisions shall remain in full force and effect.

In witness whereof, the settlor has hereunto set his name and seal and the trustee has caused these presents to be signed by its president and its corporate seal to be hereunto affixed and attested by its secretary, and the said Louis F. Rothschild and the said
176 Clarence L. Myers have hereunto set their hands and seals on the day and year first above written.

Signed, sealed and delivered
in the presence of—

MORRIS GUGGENHEIM. [SEAL.]

WM. V. TOFFEY.

COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By J. W. HARDENBERGH, *President.*

Attest:
[SEAL.] R. S. CARMICHAEL, *Secretary.*

LOUIS F. ROTHSCHILD. [SEAL.]
CLARENCE L. MYERS. [SEAL.]

WM. V. TOFFEY,
WM. V. TOFFEY.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 5th day of May, 1921, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him
177 the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] WM. V. TOFFEY,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 5th day of May, 1921, before me the subscriber personally appeared Robert S. Carmichael, who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by J. W. Hardenbergh, who was at the date of execution thereof the president of the said company, in the presence of the said deponent as the voluntary act

and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

ROBERT S. CARMICHAEL.

Subscribed and sworn to before me the date aforesaid.

[SEAL.] WM. V. TOFFEY,
Notary Public of New Jersey.

178 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 6th day of May, 1921, before me the subscriber personally appeared Louis F. Rothschild, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] WM. V. TOFFEY,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 6th day of May, 1921, before me the subscriber personally appeared Clarence L. Myers, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] WM. V. TOFFEY,
Notary Public of New Jersey.

179 *Lucile G. Gimbel trust, Exhibit No. 23*

GUGGENHEIM,
New York.

Morris Guggenheim Commercial Trust Company of New Jersey & whom else soever it may concern, this is to certify that the undersigned desires to relinquish the rights & powers in respect to the Lucile G. Gimbel trust heretofore conferred upon him by that certain instrument dated May fifth nineteen twenty-one between Morris Guggenheim, Commercial Trust Company of New Jersey, Louis Rothschild & Clarence L. Myers & to be relieved of all further duties or responsibilities in the premises & he hereby consents to the vesting of such rights & powers in any other person or persons & accordingly requests that appropriate action be taken to that end stop Am mailing certificate to foregoing effect over my signature duly acknowledged.

CLARENCE L. MYERS.

JUNE 23RD, 1925.

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA
At the City of Paris, in the Republic of France, ss:

I, Damon C. Woods, consul of the United States of America at the city of Paris, in the Republic of France, duly commissioned and qualified do certify, that, on this 23d day of June, 1925, before me personally appeared in said Paris, France, Clarence L. Myers,
180 to me personally known, and known to me to be the individual described in, whose name is subscribed to and who executed the foregoing instrument, and being by me informed of the contents of said instrument he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

DAMON C. WOODS,
Consul of the United States of America
at Paris, France.

American consulate general (Jun. 2, 1925), Paris, France.
American Consular Service. $2. Fee stamp.

181 *Lucile G. Gimbel trust, Exhibit No. 24*

NEW YORK, *June 26th, 1925.*

To Mr. Morris Guggenheim, Commercial Trust Company of New Jersey, and whom else soever it may concern:

This is to certify, that the undersigned desires to relinquish the rights and powers in respect to the Lucille G. Gimbel trust heretofore conferred upon him by that certain instrument dated May 5, 1921, between Morris Guggenheim, Commercial Trust Company of New Jersey, Louis F. Rothschild and Clarence L. Myers, and to be relieved of all further duties or responsibilities in the premises; and he hereby consents to the vesting of such rights and powers in any other person or persons, and accordingly requests that appropriate action be taken to that end.

LOUIS F. ROTHSCHILD.

STATE OF NEW YORK,
County of New York, ss:

Be it remembered, that on this 26th day of June, A. D. 1925, before me, the subscriber, personally appeared Louis F. Rothschild, who, I am satisfied, is the person named in and who executed the foregoing instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed, and delivered the same as his voluntary act and deed for the purpose therein expressed.

[SEAL] CHARLES F. KOGEL,
Notary Public, New York County.

N. Y. Co. clerk's No. 187, reg. No. 7080.
Term expires March 30, 1927.

182 *Lucile G. Gimbel trust, Exhibit No. 25*

INSTRUMENT made and executed in Jersey City, New Jersey, on the 13th day of July, 1925, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at No. 15 Exchange Place, Jersey City, New Jersey, as trustee, hereinafter called the "trustee," and S. R. Guggenheim, Simon Guggenheim and Albert E. Thiele, all of the city, county, and State of New York.

Whereas, by a certain agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917, between the above-named settlor and said Commercial Trust Company of New Jersey and Clarence L. Myers, trustees, and by an instrument between the same parties dated the 12th day of May, 1920, and by a further instrument between the settlor and said Commercial Trust Company of New Jersey dated the 3rd day of March, 1921, and by a further instrument between the above-named settlor, the said Commercial Trust Company of New Jersey, Louis F. Rothschild and the said Clarence L. Myers, dated the 5th day of May, 1921, the settlor did create a trust (known as the "Lucile G. Gimbel trust") of and in certain property, for certain purposes as in said agreement and instruments specified, for the benefit of the certain person or persons therein named; and

183 Whereas, by the terms of the said trust agreements and instruments certain rights and powers of directing or controlling the administration of the trust and the management of the trust fund were originally reserved to or retained by the settlor and were later transferred to and assumed by the said Louis F. Rothschild and Clarence L. Myers, who now desire to be relieved of their several duties and responsibilities in the premises and who have requested that they be so relieved; and

Whereas, the said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele have consented to assume the said rights and powers and to act in the place and stead of the said Louis F. Rothschild and Clarence L. Myers in the premises;

Now, therefore, this instrument witnesseth:

That the settlor, by virtue of the power and authority vested in him pursuant to the provisions of the eleventh paragraph of the said trust agreement of the 28th day of June, 1917, as amended by the above-mentioned instruments, does hereby modify and alter the said trust agreements and instruments and the trust existing thereunder, as follows:

1. By striking out of the said trust agreement and instruments the provisions thereof whereby the rights and powers of directing

or controlling the administration of the said trust and the
184 management of the trust fund were originally reserved to and retained by the settlor during his lifetime and were subsequently transferred to and vested in the said Louis F. Rothschild and Clarence L. Myers, and by vesting the said rights and powers in the said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, severally and respectively. The said trust agreement and instruments, therefore, shall hereafter be deemed and held to confer upon and vest in the said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, severally and respectively, during the life of the settlor, the rights and powers aforesaid to the same extent and with like effect as if the said trust agreement and instruments had originally so provided. The rights and powers herein referred to are those originally reserved to or retained by the settlor under and by virtue of the fifth and seventh articles or subdivisions of the said trust agreement of the 28th day of June, 1917, as heretofore amended, being the same certain rights and powers described in the instrument aforesaid between the settlor, the said Commercial Trust Company of New Jersey, Louis F. Rothschild, and Clarence L. Myers, dated the 5th day of May, 1921, and consisting of rights and powers of directing or controlling the administration of the said trust and the management of the trust fund and the action of the trustees in respect to such administration and management as set forth in the said articles or subdivisions as amended. The said rights and powers may be exercised singly and independently
185 by any one of the persons in whom they are hereby vested, or by any two of said persons jointly, or by all three of said persons jointly. The trustee shall be equally protected in acting in the premises whether the said rights and powers are exercised by one or more of the said persons. Should it ever transpire that directions given by one of said persons are in conflict with directions on the same subject or in the same matter given by another of said persons, the directions on such subject or in such matter in which any two of said persons concur shall prevail and be followed, provided three of said persons are available, but if only two of said persons are available, or if the trustee is given directions by two of said persons only, then in the event of such conflict, the trustee shall take no action in the premises, unless some action in the judgment of the trustee is necessary or desirable for the preservation or due execution of the trust, and if so necessary or desirable the trustee shall have authority to act in accordance with its best judgment and discretion, such conflicting directions notwithstanding. The said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, by becoming parties to this instrument, each for himself respectively accepts the said rights and powers and agrees and undertakes to use his best

judgment and discretion in the exercise of the same. The said Commercial Trust Company of New Jersey, by becoming a party to this instrument, consents to the assumption of the said rights and powers and their exercise by the said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele as in this instrument provided.

186 2. The right, title, and interest of the trustee, the Commercial Trust Company of New Jersey, in the trust fund and in the properties, interests, and securities comprising the same and in the management of the trust fund arising and existing under and by virtue of the said trust agreement of the 28th day of June, 1917, as amended, are hereby in all respects ratified and confirmed, subject to the terms and conditions of the said trust and subject to the exercise by the said S. R. Guggenheim, and/or the said Simon Guggenheim, and/or the said Albert E. Thiele of the rights and powers by this instrument conferred upon them severally and respectively.

3. As to any and all matters in respect to which the said rights and powers hereby transferred and conveyed may be exercised the trustee may request in writing from the said S. R. Guggenheim, the said Simon Guggenheim, and the said Albert E. Thiele, or the survivor or survivors of them, by letter addressed to their last known place of residence, written directions as to the action to be taken, and if within a period of thirty (30) days after such request has been mailed the trustee shall not receive such written directions from any one or more of the said persons so addressed, the trustee is authorized and empowered to take such action in the premises as it may deem proper and desirable under the circumstances. The trustee shall be fully protected in taking any action, in respect of which the said rights and powers may be exercised, which it

187 may have received written directions from the said S. R. Guggenheim, or the said Simon Guggenheim, or the said Albert E. Thiele, to take, as fully to all intents and purposes as it would have been protected in like case had such written directions been given by the settlor under the terms and conditions of the trust as they have heretofore existed. The said S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele, jointly and severally, shall not be or become liable or responsible to any person for any act or omission in respect to the rights and powers herein referred to, or for any other cause, matter, or thing arising hereunder, save only in the event of wilful fraud or breach of trust.

In witness whereof, the settlor has hereunto set his hand and seal and the trustee has caused these presents to be signed by its president

and its corporate seal to be hereunto affixed and attested by its secretary on the day and year first above written.

MORRIS GUGGENHEIM. [L. S.]

Signed, sealed, and delivered
in the presence of—
J. FISCHER ANDERSON.

COMMERCIAL TRUST COMPANY
OF NEW JERSEY,
By WM. J. FIELD, *President.*

188 Attest:
WM. V. TOFFEY,
Secretary.

[SEAL.]

Witness:
J. FISHER ANDERSON.

S. R. GUGGENHEIM. [L. S.]
SIMON GUGGENHEIM. [L. S.]
ALBERT E. THIELE. [L. S.]

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personnally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.]

EBEN C. HASLETT,
Notary Public of New Jersey.

189 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personally appeared William V. Toffey, who, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by William J. Field, who was at that date of execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of thet said company, and that said deponent thereupon signed the same as subscribing witness.

WM. V. TOFFEY.

Subscribed and sworn to before me the date aforesaid.

[SEAL.]

EBEN C. HASLETT,
Notary Public of New Jersey.

190 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personally appeared S. R. Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] EBEN C. HASLETT,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personally appeared Simon Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] EBEN C. HASLETT,
Notary Public of New Jersey.

191 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, 1925, before me the subscriber personally appeared Albert E. Thiele, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.] EBEN C. HASLETT,
Notary Public of New Jersey.

Lucile G. Gimbel trust, Exhibit No. 26

INSTRUMENT made and executed in Jersey City, New Jersey, on the 13th day of July, 1925, by Morris Guggenheim, a resident of the city, county, and State of New York, hereinafter called the "settlor," and Commercial Trust Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, having an office for the transaction of business at No. 15 Exchange Place, Jersey City, New Jersey, as trustee, hereinafter called the "trustee."

Whereas, by a certain trust agreement made and executed in Jersey City, New Jersey, as of the 28th day of June, 1917,
192 between the above-named settlor and said Commercial Trust Company of New Jersey and Clarence L. Myers, trustees, and

by an instrument between the same parties dated the 12th day of May, 1920, and by a further instrument between the settlor and said Commercial Trust Company of New Jersey, dated the 3rd day of March, 1921, and by a further instrument between the above-named settlor, the said Commercial Trust Company of New Jersey, Louis F. Rothschild and the said Clarence L. Myers, dated the 5th day of May, 1921, and by a further instrument between the above-named settlor, the said Commercial Trust Company of New Jersey, S. R. Guggenheim, Simon Guggenheim and Albert E. Thiele, dated the 13th day of July, 1925, the settlor did create a trust (known as the "Lucile G. Gimbel trust") of and in certain property, for certain purposes as in said agreement and instruments specified, for the benefit of the certain person or persons therein named; and

Whereas, the settlor in the first, second, and eleventh paragraphs of said trust agreement of the 28th day of June, 1917, as amended by the instruments above referred to, reserved certain powers including powers to control the distribution of the income of the trust and to modify or alter or revoke said trust and now desires to relinquish and terminate all such powers.

Now, therefore, this agreement witnesseth:

That the settlor, by virtue of the power and authority
193 vested in him pursuant to the provisions of the said eleventh paragraph of the said trust agreement of the 28th day of June, 1917, as amended by the above-mentioned instruments, does hereby modify and alter the said trust agreement and instruments and the trust existing thereunder as follows:

1. By modifying and altering the terms and provisions of the first article or subdivision of the said trust agreement of the 28th day of June, 1917, as amended by the instruments of May 12, 1920, and of March 3, 1921; by eliminating therefrom and cancelling the sentence in the instrument of May 12, 1920, reading as follows:

"In respect to the accumulated income of the trust fund at any time accrued and received thereon and held by the trustees as an addition to and part of the principal of the trust fund, whether in the shape of money or other funds or in the shape of securities or other property, and either before or after investment or reinvestment, the settlor may at any time and from time to time, by directions in writing signed by him and delivered to the trustees, cause and require such accumulated income, or any part or parts thereof, to be assigner, transferred, conveyed, paid over, surrendered, and delivered by the trustees to the beneficiary of the said trust, Lucile G. Gimbel, absolutely and free of all restrictions."

and by eliminating therefrom and cancelling the sentences in the instrument of March 3, 1921, reading as follows:

194 "The settlor may at any time, and from time to time by directions in writing delivered to the trustee, increase the aggregate amount of payments to be made annually to the said Lucile G. Gimbel, above the yearly rate or sum hereinbefore specified, to

any extent not exceeding the full amount of the annual net income of the trust fund; and the settlor may likewise at any time, and from time to time by directions in writing delivered to the trustee, decrease the aggregate amount of the payments to be made annually to the said Lucile G. Gimbel below any amount to which such payments may previously have been increased as herein provided, to any extent down to the amount of such payments first hereinbefore specified."

2. By modifying and altering the terms and provisions of the said trust agreement of the 28th day of June, 1917, as amended by the instrument of March 3, 1921, by eliminating therefrom and cancelling the eleventh article or subdivision thereof.

3. The rights and powers in the trust fund and in the properties, interests, and securities comprising the same and in the management of the trust fund vested in S. R. Guggenheim, Simon Guggenheim, and Albert E. Thiele by the instrument executed on the 13th day of July, 1925, are hereby in all respects ratified and confirmed, subject to the terms and conditions of the said trust agreement and the instruments modifying and amending the same.

195 In witness whereof, the settlor has hereunto set his hand and seal and the trustee has caused these presents to be signed by its president and its corporate seal to be hereunto affixed and attested by its secretary on the day and year first above written.

MORRIS GUGGENHEIM, [L.S.]

Signed, sealed and delivered
in the presence of—
J. FISHER ANDERSON.

COMMERCIAL TRUST CO.
OF NEW JERSEY,
By WM. J. FIELD, *President.*

Attest:

WM. V. TOFFEY, *Secretary.*

[SEAL.]

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that on this 13th day of July, A. D. 1925, before me the subscriber personally appeared Morris Guggenheim, who, I am satisfied, is one of the persons named in and who executed the foregoing instrument and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed,
196 and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

[SEAL.]

EBEN C. HASLETT,
Notary Public of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered that, on this 13th day of July, A. D. 1925, before me the subscriber personally appeared William V. Toffey, whom, being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the Commercial Trust Company of New Jersey, one of the parties named in the foregoing instrument; that the seal thereto affixed is the proper corporate seal of the said company; that the said seal was so affixed thereto and the said instrument signed and delivered by William J. Field who was at the date of execution thereof the president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company, and that said deponent thereupon signed the same as subscribing witness.

WM. V. TOFFEY.

Subscribed and sworn to before me, the date aforesaid.

[SEAL.]

EBEN C. HASLETT,
Notary Public of New Jersey.

197

24 B. T. A. ——

Before United States Board of Tax Appeals

Docket No. 43698

MURRY GUGGENHEIM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petitioner created revocable trusts in 1917; in 1925 he relinquished his powers of revocation. Held, that the relinquishment of the powers constituted gifts within the meaning of the gift-tax provisions of the revenue act of 1924, and amendments thereto by the revenue act of 1926.

George E. Cleary, Esq., for the petitioner.
Frank T. Horner, Esq., for the respondent.

Opinion

Promulgated December 18, 1931

ARUNDELL: In 1925 the petitioner relinquished his power of revocation of two trusts established in 1917. This act is held by respondent to constitute a gift with in the meaning of the gift-tax
198 provisions of the revenue act of 1924, and he has asserted a deficiency in gift tax in the amount of $2,465,681.20.

A lengthy stipulation of facts was filed which is incorporated herein by reference as our findings of fact. A brief summary of

the facts will suffice for the purposes of understanding and deciding the case.

The petitioner, at all times material hereto, has resided in New York, New York, and thus has been a resident of the United States.

On June 28, 1917, he established two trusts in New Jersey; one for the benefit of his only son, Edmond, and the other for the benefit of his only daughter, Lucile G. Gimbel. An individual and a trust company were the original trustees. The trusts were to continue for ten years unless sooner terminated. A substantial amount was to be paid annually to the beneficiary of each trust and at the end of the ten-year period the principal of each trust was to be paid to the beneficiary, free of all restrictions.

There were provisions for the children of a beneficiary in case the beneficiary died within the ten-year period, and in the event of the death of a beneficiary without surviving children, then the petitioner was to receive the principal and accumulations.

The petitioner retained the right to alter or revoke each trust except as to income received or accrued, and to direct the making of all changes in the securities included in the trust property. Subject to the petitioner's approval, the trustees were authorized to do all things necessary in connection with the trust property.

199 The trustees were given the custody of the trust funds and all securities were listed in their names or in the names of their nominees.

Various changes in the trust agreements were made from time to time. For example, in 1921 the petitioner gave to two individuals the power, formerly reserved to himself, of directing and approving the management of the trusts.

On July 13, 1925, the final change in the trusts was made, whereby the petitioner relinquished his power to alter, modify, or revoke the trusts.

The corporate trustee continued throughout the period, but there were changes in the individual trustees. The petitioner was never a trustee.

The petitioner delivered to the trustees the securities constituting the corpus of the trust on June 28, 1917, and the trustees have held all securities of the trust since that date. The trustees have collected all income and profits of the trust and have distributed a substantial part thereof to the two beneficiaries, as provided by the agreements. The petitioner has never received any income of the trusts nor had any of such income expended for his benefit. He substituted some securities for others in 1918 for the last time. As securities were delivered by the petitioner to the trustees, such items were eliminated from his accounts. He never used the trusts for personal loans or for personal credit in any way. The value of his separate property has at all times greatly exceeded the value of the trust property.

200 After May 5, 1921, he never exercised any rights of management or control over the trust property.

The corporate trustee was a regular trust company doing other business. The petitioner was not interested in it financially.

The petitioner, his wife, and their two children were all living and of age during the period 1917 to 1925, inclusive.

The fair market value on July 13, 1925, of the securities constituting the corpus of these two trusts was $13,110,463.44, including $116,548.72 representing accrued interest not received and dividends declared but not received. The respondent agrees to eliminate the latter amount from the amount subject to gift tax.

The respondent has asserted the tax under section 319 of the revenue act of 1924, which, as far as material here, provides for the imposition of tax:

"For the calendar year 1924 and the calendar year 1925 * * * upon the *transfer* by a resident *by gift* during such calendar year of any property wherever situated, whether made directly or indirectly * * *." (Italics supplied.)

This statute, as applied to gifts made after its enactment, has been held valid in Bromley v. McCaughn (280 U. S. 124), but invalid as to gifts made prior to June 2, 1924. (Untermeyer v. Anderson, 276 U. S. 440.)

The question here is whether the value of the corpus of the
201 two trusts may be used as the measure of the gift tax asserted on the ground that the "transfer * * * by gift" occurred in 1925 when the settlor relinquished his reserved power to alter, amend, or revoke the trusts which were created in 1917, prior to the enactment of the statute imposing the gift tax. We think it must be conceded that the term "gift" as used in the statute merely designates the transfers selected for tax, i. e., only such transfers as are donative in character have been selected. The term designates the character of the transfer rather than the medium used in effecting it. The parties assume that "transfer by gift" as used in the statute includes all trusts created after the passage of the act, and there can be no doubt of this if the statute is not to be completely nullified by so ready a means of evasion. Thus the tax is imposed upon transfers made "directly or indirectly." The fact that section 319 is broad enough to include the creation of a trust, donative in character, also finds support in subdivisions (a) (2) and (b) (1) of section 321, which allow certain deductions in computing the amount of the gifts subject to the tax imposed by section 319. Both of these subdivisions mention and allow the deduction of gifts made "to or for the use of" various corporations for political or charitable purposes and gifts made "to a trustee or trustees" for similar purposes. But counsel for the petitioner suggests that every essential thing was done in 1917 when the trusts were created. The property was then transferred to a corporate trustee and provision was made that all
202 or some part of the income should go to petitioner's children, merely the right being reserved to alter, amend or revoke the trusts, and it is said that the surrender in 1925 of this reserved right surely can not constitute a transfer within the meaning of the gift tax

statute. But this reserved right which was relinquished in 1925 was the absolute right to control the corpus and the income of the two trusts. At a word from petitioner he was reinvested with the full and complete ownership of the corpus and the income and earnings therefrom on and after the date he might take such action. The rights of the children were complete only as far as income paid and accrued prior to the time petitioner exercised his reserved right to alter, amend, or revoke the trusts. This reserved power may be as petitioner says, the mere right to revoke, but it is the essence of ownership and control. Prior to 1925, when petitioner relinquished the right of revocation, the property was his, not his children's, and he alone could have withdrawn every right they had without legal redress on their part. That a gift by a deed of trust, in which the right of revocation is reserved to the grantor, does not become effective until the termination of the right, is held in numerous decided cases. (See In re Hanna's Estate, 195 N. Y. S. 749; In re Schmidlapp's Estate, 196 N. Y. S. 108, citing Lines Estate, 155 Pa. 378, 26 Atl. 728; Matter of Bullen, 143 Wis. 512; 128 N. W. 109; Blodgett v. Union & New Haven Trust Co., 97 Conn. 405, 116 Atl. 909; Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549.)

203 This tax, like the estate tax, is on the "transfer" of property. In Chase National Bank v. United States (278 U. S. 327), involving insurance policies, it was held that the transfer was uncompleted until the insured's right to change the beneficiaries was terminated.

The court said:

"Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which made it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers."

The quoted language is particularly significant when it is recalled that the revenue act of 1921 under which the Chase National Bank was decided does not in terms purport to tax transfers or trusts in which the donor retains the power of alteration as do the later revenue acts. (See section 303 (d), revenue acts of 1924 and 1926.) And the same reasoning was applied in Reinecke v. Northern Trust Co. (278 U. S. 339), in holding that the estate tax applied to the revocable trusts involved, the court saying:

"* * * a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death."

In Means v. United States (— Ct. Cls. —; 39 Fed. (2d)

204 748; certiorari denied) the Court of Claims had facts on all fours with the present case and sustained the imposition of the tax, citing as authority Saltonstall v. Saltonstall (276 U. S. 260), Reinecke v. Northern Trust Co., and Chase National Bank v. United States, supra. In its opinion the Court of Claims said that the

Supreme Court in the cases relied on determined the precise question of the effective date "of the transfer of property where the donor in trust instruments had reserved to himself the unrestricted rights of revocation." The petitioner contends that the Court of Claims misapprehended the scope of the Supreme Court decisions. It is argued that the cases cited are not controlling as the Supreme Court was considering them solely from the standpoint of the constitutional power of Congress to tax as transfers the termination of reserved powers to alter the instruments there involved. It is true that in the cited cases constitutional questions were presented to the court. But in each case the decision turned upon the question of whether the termination of a power after the enactment of the taxing act constituted a transfer within the meaning of the act.

This is distinctly brought out in the Northern Trust Co. case, in which the settlor of two revocable trusts created in 1903 and 1910 died in 1922, while the revenue act of 1921 was in effect. At the time this case was under consideration Nichols v. Coolidge (274 U. S. 531) had already held that the 1918 act was invalid in so far as it attempted to tax "transfers completed before any such
205 statute was enacted," and it was contended that the two trusts came within that rule. But the court held otherwise on the ground that the reserved power in the settlor alone prevented the transfers from being complete until such power was terminated. The opinion reads in part:

"But in No. 77, Chase National Bank v. United States (278 U. S. 327; 49 S. Ct. 126, 73 L. Ed. ——), decided this day, the decision is rested on the ground, earlier suggested with respect to the fourteenth amendment in Saltonstall v. Saltonstall (276 U. S. 260; 48 S. Ct. 225; 72 L. Ed. 565), that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence section 402, as applied to the present transfers, is not retroactive, since his death follows the passage of the statute. For that reason, stated more at length in our opinion in Chase National Bank v. United States, supra, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts * * *."

In the Chase National Bank case the court states the question before it in this way:

"The precise question presented is whether the termination at death of that power [to change the beneficiary] and the consequent passing to the designated beneficiaries of all the rights under the
206 policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled."

In deciding the question the court held in part:

"*A power in the decedent* to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them

and their proceeds for his own benefit during his life * * * is by no means the least substantial of the legal incidents of ownership, *and its termination at his death*, so as to free the beneficiaries of the policy from the possibility of its exercise *would seem to be no less a transfer* within the reach of the taxing power *than a transfer effected in other ways through death.*" (Italics supplied.)

This case is strikingly parallel to the Northern Trust Co. case, in so far as the so-called two trusts were involved. In that case the decedent had created two trusts, reserving to himself alone the power of revocation, and died in 1922 without having exercised the powers. The estate tax statute imposed a tax "upon the transfer of the net estate" and provided for the inclusion in the estate of all property

"to the extent of any interest therein of which the decedent
207 has at any time made a transfer or with respect to which he has at any time created a trust * * * intended to take effect in possession or enjoyment at or after his death * * *." In the instant case the taxpayer created trusts in 1917 wherein he reserved to himself alone the power to alter, amend, or revoke, and terminated that power in 1925 by relinquishing it. The applicable statute here taxes "the transfer * * * by gift * * * of any property * * * whether made directly or indirectly * * *." If in the one case the termination of the power of revocation constituted a completed and taxable transfer, it seems to us that it does so in the other. We are accordingly of the opinion that the Court of Claims correctly construed the statute in the Means case, and properly applied the reasoning of the Supreme Court in the cases cited by it.

The gift tax act was designed primarily to prevent evasion of the estate tax act and the surtax provisions of the income tax laws. In introducing the gift-tax provisions on the floor of the House the then chairman of the Ways and Means Committee stated (Congressional Record, 68th Congress, 1st session, vol. 65, part 3, pp. 3119 and 3220): "The gift tax is a corollary to the estate tax. It is perfectly idle to attempt to raise the estate tax, as we have done today, and make no provision with reference to gifts. The estate tax at the present time is being largely evaded by the splitting up of the large estates * * *." (See also Cong. Record, vol. 65, part 4, pp. 3172, 3173; part 8, p. 8095, and dissenting opinion by Justice Brandeis in Untermeyer v. Anderson, supra.)

208 In view of the purpose for which the statute was enacted, and its language like that of the estate tax provisions in taxing the "transfer" of property, it is our opinion that it should be construed in harmony with the construction placed on the estate tax statute, and if this is done it follows inevitably that the transfer by means of trusts donative in character is not complete until the power of revocation is terminated.

The construction we place on the statute is the same as that of the respondent in Regulations 67, article 1, reading in part:

"The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself the title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated."

We think it is not without a significance that while Congress amended the gift-tax sections of the 1924 act as to rates by sections 324 and 325 of the revenue act of 1926, no change was made in the imposing section which prior thereto had been construed by the respondent as above set out.

209 In conclusion, it is our opinion that the transfers of property by means of the trusts herein were transfers by gift within the meaning of the statute; that the transfers were not completed until the settlor relinquished his power of revocation in 1925; and that the Means case correctly interpreted the statute and should be followed in this proceeding.

Reviewed by the board.

Decision will be entered under Rule 50.

Concurring opinion

McMAHON, concurring: The correct result has been reached in this proceeding.

A gift has been defined as follows:

"The general rule deductible from the many and more or less variant statements found in the decisions is that to constitute a valid gift *inter vivos* there must be a donor competent to make it; freedom of will on his part; as intention on his part to make it, a donee capable of taking the gift; the gift must be complete and nothing left undone; the property must be delivered by the donor; and accepted by the donee; the gift must go into immediate and absolute effect; the gift must be gratuitous; *the gift must be irrevocable*, 28 C. J. 626. (Underscoring ours.)"

See Copland v. Commissioner of Internal Revenue (41 Fed. (2d) 501, 504) and Lee v. Lee (5 Fed. (2d) 768).

Applying all these tests, there was a gift of the corpus of
210 the two trusts. The real question is as to when this gift was made, whether in 1925 or previous thereto.

In the instant proceeding there were present all of the elements pointed out in these authorities essential to the making of a gift, of the corpus of the trusts, when, on July 13, 1925, the grantor relinquished his power to alter, modify or revoke the trusts. The transfer of the corpus of the trusts was then and thereby completed.

This relinquishment of this power was the final step of the grantor in the completion of the making of the gift. There was nothing further necessary, or that he could do, to complete the gift. There was nothing that he could thereafter do to defeat the gift. There was no completed gift of the corpus of the trusts previous to July 13, 1925. On that date the gift of the corpus of the trusts became effective immediately, upon the relinquishment by the grantor of his right to alter, modify or revoke the trusts.

There is no good reason why the making of a gift inter vivos can not be accomplished by a series of acts on the part of the grantor extending over a period of time; or, in other words, why all of them must occur simultaneously. (Cf. Continental Life Ins. Co. v. Sailor, 47 Fed. (2d) 911.)

In the instant proceeding we have a series of acts on the part of the grantor which commenced with the creation of the trusts on June 28, 1917, and culminated in his relinquishment of his power of alteration, modification and revocation, on July 13, 1925, resulting in the making of a gift, all in conformity with a carefully
211 formed intention on his part so to do, which intention is clearly reflected by his conduct consisting of these various acts.

Upon the foregoing authorities, construed in the light of what occurred here, the gift of the corpus of the trusts was completed on July 13, 1925.

Section 319 of the revenue act of 1924, as amended by section 324 of the revenue act of 1926, imposes a tax on a "transfer by a resident by gift * * * of any property wherever situated, whether directly or indirectly." There is no ambiguity in this phraseology as applied to the facts in the instant proceeding. Regulations 67, article 1, promulgated by the Commissioner of Internal Revenue, as applied to these facts, are in harmony with the provisions of the statute and a correct interpretation of it. The gift in issue in this proceeding is clearly taxable under the statute.

Dissenting opinion

MURDOCK, dissenting: The commissioner has held the petitioner liable for a gift tax on the theory that on July 13, 1925, the petitioner made a transfer by gift of the then corpus of the two trusts because on that date he relinquished his retained power of revocation. The Court of Claims sustained the commissioner in a parallel case. (Means v. United States, 39 Fed. (2) 748; certiorari denied, 282 U. S. 849.) Now the board, employing and approving the reasoning of the Court of Claims in the Means case, again sustains the commissioner. The board and the Court of Claims rely upon Saltonstall v. Saltonstall (276 U. S. 260), Chase National Bank v.
212 United States (278 U. S. 327), and Reinecke v. Northern Trust Company (278 U. S. 339), and the reasoning of the

Supreme Court in deciding those cases. In my opinion the board and the Court of Claims have not given due consideration to the fact that the solution of the only question presented in these cases depends upon a proper interpretation of the statutes to see whether or not the gift tax provisions impose a tax under the facts.

In the three Supreme Court cases relied upon, the court took occasion to point out in each that there was no question of statutory construction, and a constitutional question only was involved.

In Saltonstall v. Saltonstall, supra, the Supreme Court accepted the State court's interpretation that a tax had been clearly imposed and it considered only the right of the legislative branch of the State government to impose such a tax. It held that a reserved power of appointment left the transfer incomplete and subject to tax.

In Reinecke v. Northern Trust Company, supra, there were seven trusts involved, which the court divided into two groups; one of two trusts, and the other of five. The decision of the court in regard to the two trusts is relied upon in the prevailing opinion of the board. Section 401 of the revenue act of 1921 imposed a tax upon the transfer of the net estate. Section 402 (c) provided that there should be included in the gross estate all property "to the extent of any interest therein of which the decedent has at any time made a
213 transfer, or with respect to which he has at any time created a trust * * * intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act)." The two trusts had been created before the passage of any statute imposing an estate tax. In these two trusts the settlor had reserved to himself the income for life and on his death the income of each was to be paid to a designated person until the termination of the trust, with remainders over. The settlor reserved to himself alone a power of revocation of the trusts. The only question which the Supreme Court considered was whether or not the taxing statute, if applied to these two trusts, was unconstitutional and void, because retroactive, within the ruling of Nichols v. Coolidge (274 U. S. 531), in which it had held that a similar section of the 1918 act was retroactive and unconstitutional as applied to transfers completed by the creation of trusts prior to the enactment of any such taxing statute. The court held:

"A transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence, section 402, as applied to the present transfers, is not retroactive since his death follows the passage of the statute. For that reason stated more at length in our opinion in Chase National Bank v. United States, supra, we held that the tax was rightly imposed on the transfers of the corpus of the two trusts * * *."

214 The court considered that these two trusts were intended to take effect in possession or enjoyment at or after the decedent's death and thus they were covered by a specific provision of

the statute. The only question was, could this provision be constitutionally applied to trusts of this kind.

In the Chase National Bank case the only question involved was the constitutionality of section 401 as supplemented by that part of section 402 (f) of the revenue act of 1921 which provided that the value of the gross estate should include all property "to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." Section 401 imposed a tax upon the transfer of the net estate of every decedent. The Supreme Court said:

"The tax is plainly imposed by the explicit language of sections 401 and 402 (f) if those sections are constitutionally applied.

* * * * * * *

"The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise *may be* the legitimate subject of a transfer tax * * *." (Italics supplied.)

In that case the decedent had taken out several insurance policies on his own life, aggregating $200,000. In each he named his
215 wife as beneficiary, but reserved to himself the right to change the beneficiary. He made no change up to the date of his death. The court held:

"Such an outstanding power residing exclusively in a donor *to recall a gift after it is made* is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death *may* also *be* the appropriate subject of a tax upon transfers." (Italics supplied.)

Thus it appears that in each of these cases there were specific provisions clearly imposing the tax and the only question was, were these provisions constitutional. Here the question is quite different. There is no express provision which clearly covers the present situation, and we are asked to hold that the general provision is sufficient. (Cf. Tyler v. United States, 281 U. S. 497.) If in the last two cases section 401 had stood alone without the specific provisions of 402, a question like ours could have been raised. But section 401 did not stand alone and this question was never presented to the Supreme Court. In my opinion we can not decide the question of statutory interpretation here presented on authority of these decisions of the Supreme Court on a totally different question.

But it is argued that the reasoning of the Supreme Court in these three cases is decisive of the present controversy. I do not think so. It was only necessary for the Supreme Court to hold in each
216 that the transfer was not complete until the termination of the power of revocation. The specific provisions were therefore not unconstitutional. Anything further which the court may have said was dicta which it is free to disregard if it ever has to decide the present case.

The petitioner is willing to concede that Congress had the power to impose a tax which would apply to a case such as this one. But the principal question which he raises is, has Congress done so. He claims that there is at least doubt whether the words used should be interpreted as covering the present situation.

In section 319 of the revenue act of 1924, as amended by section 324 of the revenue act of 1926, a tax was "imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly." The act further provided that the amount of the gift to be taxed would be the fair market value of the property at the date of the gift. That the act taxes some transfers which occur through the medium of trusts must be conceded in view of the provisions of subdivisions (a) (2) and (b) (1) of section 321. I will concede, for the sake of argument, that the logical time to tax a transfer such as was made here would be at the termination of the power. See, however, section 322. The petitioner assumes that "transfer by gift" as used in these acts, includes trusts created after the passage of the revenue act of 1924. But, he argues, it should not be applied where, as here, a trust was created prior to the passage of the revenue act of 1924 and the only thing that happened thereafter was the termination of a power
217 to alter, amend, or revoke by voluntary relinquishment. He reasons that Congress had in mind "relinquishment of powers to revoke trusts" and distinguished such relinquishment from transfers by gift by providing for both where it so intended; in the estate tax title of the revenue act of 1924, there appeared a new provision specifically including in the gross estate the value of property with respect to which the decedent had created a trust and reserved any power to himself to alter, amend, or revoke section 302 (c); no such elaboration appears in the gift tax provision; if necessary in one place, it is necessary in the other (see also sections 402 (c) of the revenue acts of 1918 and 1921 and section 302 (c) of the revenue act of 1924, in all of which transfers, on the one hand, and creations of trusts on the other, are separately provided for); when the statute is read as a whole and the language of various sections is compared, it is clear that Congress did not intend the gift tax provision to cover a case where in the year in question there was only a relinquishment of a power to alter, amend, or revoke a trust theretofore created; and, furthermore, since the relinquishment of the power to alter, amend or revoke a trust is not ordinarily regarded as a transfer of property by gift, the language of the statute must be clear if such an act is to be within the scope of the gift tax (cf. section 219 (g) of the revenue act of 1924). The commissioner has failed to reply to these arguments of the petitioner, and the board fails to dispose of them adequately. I think they have considerable persuasive force. (Cf. Reinecke v. Gardner, 277 U. S. 239.)

218 Mr. Justice Holmes, in speaking for one-half of the court in regard to the same provisions which we are here considering, said "The act should be read as referring only to transactions

taking place after it was passed * * *." (Blodgett v. Holden, 275 U. S. 142.) The creation of this trust was a transaction which took place prior to the passage of the act. The trust was valid even though the creator retained the power to alter, amend or revoke it. (Stone v. Hackett, 12 Gray 227; Farmers' Loan & Trust Co. v. Bowers, 29 Fed. (2) 14; Hibbard, Spencer, Bartlett & Co., 5 B. T. A. 464.) "The right to revoke, unexercised, is a dead thing. Its presence in a deed does not alter the character of the instrument or estate granted." (In re Dolan's Estate, 279 Pa. 582.) Power of revocation does not affect the legal title to the property. After the relinquishment of this power the trust was no more effective than formerly. (Cf. J. T. Fargason, 21 B. T. A. 1032.) Here the grantor did not retain the income to himself for life as in the Saltonstall and Reinecke cases, supra. The act taxes a "transfer" "by gift" "of any property." The relinquishment affected no physical transfer, no change in possession, and no change in the legal or equitable title to the trust res. The holder of the power was not technically the owner of the trust property at the time he relinquished the power itself "is not a property right nor an interest in property." (Farmers' Loan & Trust Co., v. Bowers, supra. Cf. Jones v. Clifton, 101 U. S. 225.) Technically the relinquishment did not transfer
219 but rather extinguished something. Cf. In re Hall's Estate, 99 N. J. L. 1; affd. (100 N. J. 405.) Thereafter, that which had vested could never be divested, the gift could no longer be recalled. Here only one thing happened after the passage of the act, the relinquishment of the power. It was at most but the final step of the grantor. Alone and separated from the steps previously taken it certainly did not transfer anything. It merely completed the shifting of the economic benefits which had been at least partially accomplished prior to 1924. If the act be held to impose a tax upon such a transaction, it must be read as referring not only to that part of the transaction which took place after it was passed (the relinquishment), but also to that part which took place before it was passed (the creation of the trust). But the act only applies to transfers made during the taxable year.

Tax provisions must be strictly construed, and if there be doubt as to a proper construction, that doubt must be resolved in favor of the taxpayer. (Gould v. Gould, 245 U. S. 151; United States v. Merriam, 263 U. S. 179; Reinecke v. Northern Trust Company, supra.) The language used must be reasonably construed but may not be extended by implication or otherwise. (Smietanka v. First Trust and Savings Bank, 257 U. S. 602.) The statute should be read as a whole. (Hellmich v. Hellman, 276 U. S. 233.) Vague or doubtful interpretations may never serve to impose a duty upon a citizen, but clear and express words are required for that purpose. (Isham v. United States, 17 Wall 496; Hartranft v. Wiegmann, 121 U. S. 609.) Not only could Congress have easily ex-
220 pressed more clearly an intention to tax upon the termination of a power to revoke, but when it has had such an intention it

has usually expressed it more clearly. Nothwithstanding the administrative construction adopted by the Treasury Department, I think that there is at least doubt as to whether the gift tax provisions, strictly construed and giving to the words used their ordinary meaning, impose a tax on the transfers here in question. (Cf. United States v. Field, 255 U. S. 257.) That doubt should be resolved in favor of the taxpayer.

MATTHEWS and GOODRICH agree with this dissent.

A true copy. Teste:

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

221 Before United States Board of Tax Appeals

Docket No. 43698

MURRY GUGGENHEIM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the opinion promulgated December 18, 1931, the respondent herein on January 4, 1932, having filed a proposed redetermination of the gift tax liability of the above-named taxpayer for the calendar year 1925; and the petitioner on January 6, 1932, having filed a consent to the proposed redetermination, it is

Ordered and decided that there is a deficiency in gift tax for the year 1925 of $2,436,544.02.

(Signed) C. ROGERS ARUNDELL,
Member.

Enter.

Entered Jan. 6, 1932.

A true copy. Teste:

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

222 Before United States Board of Tax Appeals

[Title omitted.]

Petition for review

Filed Jan. 9, 1932

Murry Guggenheim, the petitioner in this cause, by Elihu Root, jr., and George E. Cleary, his counsel, hereby files his petition for a review by the Circuit Court of Appeals for the Second Circuit of the decision by the United States Board of Tax Appeals rendered January 6, 1932 (see 24 B. T. A. —), determining a deficiency in petitioner's Federal gift tax for the calendar year 1925 in the amount of $2,436,544.02, and respectfully shows:

1. The petitioner is an individual residing at 998 Fifth Avenue, New York, New York, and was in 1925 and still is, an inhabitant of the Second Circuit.

2. NATURE OF CONTROVERSY.

The controversy involves the proper determination of the
223 petitioner's liability for Federal gift tax for the calendar year 1925 under sections 319 to 324 of the revenue act of 1924, as amended by section 324 of the revenue act of 1926. The question of law is whether these provisions should be construed as imposing a gift tax on the petitioner because of the relinquishment by him in 1925 of the power to modify, alter, or revoke two trusts established by him for the benefit of his children long prior to the enactment of such provisions.

The petitioner in 1917 established two trusts, one for the benefit of his only son, Edmond, and the other for the benefit of his only daughter, Lucile G. Gimbel. Each trust was to continue for ten years unless sooner terminated; the income during this period was to be in part distributed, and in part accumulated, and at the end of the 10-year period the principal and accumulated income of each trust were to be paid to the beneficiary free of all restrictions. Each trust provided in detail for the disposition of the property in case the beneficiary died within the 10-year period, every contingency for the ultimate disposition of the property without further act of the petitioner being provided for.

The petitioner retained the power to modify, alter, or revoke each trust, except as to income received or accrued. On July 13, 1925, he amended the trust instruments by striking therefrom the clauses under which he had reserved the power to modify, alter or revoke the trusts, thereby relinquishing these powers and making the trusts irrevocable, and the question is whether such relinquish-
ment constituted a "transfer * * * by gift * * * of
224 any property" during the year 1925, within the meaning of those words as used in the statute.

The securities constituted the trusts were delivered by the petitioner to the corporate trustee on June 28, 1917, and were in its custody at all times thereafter and all such securities were listed in its name or in the names of its nominees. The petitioner substituted some securities for others in 1918 for the last time. The petitioner was never a trustee. The trustees collected all the income and profit of the trusts and distributed a substantial part thereof to the two beneficiaries as provided by the agreements. The petitioner never received any income from the trusts nor had any of such income expended for his benefit. The securities delivered by the petitioner to the trustees were eliminated from his accounts when so delivered. He never used the trusts for personal loans or for personal credit in any way. The value of his separate property has at all times greatly exceeded the value of the trust property.

In 1921 the petitioner transferred to others the power, formerly reserved to himself, of directing and approving the management of

the trusts, and after May 5, 1921, petitioner never exercised any powers of management or control over the trust property.

The corporate trustee was a regular trust company, in which petitioner was not interested financially.

In accordance with the provisions of section 318 of the revenue act of 1926, D. H. Blair, as Commissioner of Internal Revenue,
225 determined a deficiency in the amount of $2,465,681.20 in gift tax for the calendar year 1925 against the petitioner on the basis that the relinquishment by petitioner on July 13, 1925, of the power to modify, alter, or revoke the two trusts constituted a transfer by gift during the calendar year 1925 of the property constituting the corpus of the two trusts and the income accrued thereon, taken at their value on July 13, 1925, of $13,137,818.99, and on March 8, 1929, said Blair mailed to petitioner a notice of said deficiency; thereafter, within sixty days from said date and on April 16, 1929, the petitioner filed a petition for redetermination of such deficiency by the United States Board of Tax Appeals; thereafter and on November 5, 1930, said appeal was heard by said board, the findings of fact and opinion of said board were promulgated on December 18, 1931, affirming the action of the commissioner, except as to the inclusion in the taxable gifts of $116,548.72 of accrued income, and the order of final determination by said board finding a deficiency in petitioner's gift tax for 1925 of $2,436,544.02, was entered on January 6, 1932, and said redetermination is the final decision of said board in the matter.

3. In rendering said decision and in entering said order of final redetermination, manifest errors were committed by said board to the prejudice of the petitioner herein, as will appear more in detail from the assignments of error set forth below, said board's erroneous conclusion that the relinquishment in 1925 by petitioner of his
226 power to modify, alter, or revoke the two trusts was a transfer of property by gift subject to gift tax under the statute resulting in the erroneous determination of a deficiency of $2,436,544.02 for that year instead of a determination that there was no deficiency.

4. ASSIGNMENTS OF ERROR.

The errors committed by the Board of Tax Appeals upon which the petitioner relies as the basis of this proceeding are as follows:

(1) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's gift tax for the calendar year 1925 of $2,436,544.02.

(2) The Board of Tax Appeals erred in refusing to determine that there was no deficiency in petitioner's gift tax for the calendar year 1925.

(3) The Board of Tax Appeals erred in holding that the petitioner, during the calendar year 1925, made a transfer by gift, subject to gift tax under section 319 of the revenue act of 1924, as amended, of the property constituting the corpus of two trusts created by petitioner on June 28, 1917, in favor of his son, Edmond A. Guggenheim, and his daughter, Lucile G. Gimbel, respectively.

(4) The Board of Tax Appeals erred in refusing to hold that no part of the property constituting the corpus of said two trusts
227 was transferred by gift by petitioner during the calendar year 1925.

(5) The Board of Tax Appeals erred in holding that the relinquishment by petitioner during the calendar year 1925 of his power to modify, alter, or revoke said two trusts created by him in 1917 constituted a transfer by him by gift during the calendar year 1925 of any property.

(6) The Board of Tax Appeals erred in refusing to hold that the petitioner made no transfer of any property by gift during the calendar year 1925, by relinquishing in that year the power to modify, alter, or revoke said two trusts.

(7) The Board of Tax Appeals erred in refusing to hold that the petitioner had made a transfer, prior to the calendar year 1925, of the property constituting the corpus of said two trusts.

(8) The Board of Tax Appeals erred in construing section 319 of the revenue act of 1924, as amended, as imposing a gift tax upon the petitioner by reason of the relinquishment by petitioner during the calendar year 1925 of the power to modify, alter, or revoke two trusts created by him prior to the enactment of section 319 of the revenue act of 1924 or any similar taxing statute.

(9) The Board of Tax Appeals erred in refusing to construe section 319 of the revenue act of 1924, as amended, as not impos-
228 ing a tax upon the petitioner by reason of the relinquishment by petitioner during the calendar year 1925 of the power to modify, alter, or revoke two trusts created by him prior to the enactment of section 319 of the revenue act of 1924, or any similar taxing statute.

Wherefore, your petitioner prays the United States Circuit Court of Appeals for the Second Judicial Circuit to review said proceedings and said order entered by the United States Board of Tax Appeals in this cause, and to reverse the order of said board, and direct the entry of an order by said board determining that there was no deficiency in petitioner's gift tax for the calendar year 1925, or for such other and further relief as may to said court appear proper in the premises, and that a duly authenticated transcript of the pleadings, exhibits, proof, evidence, record, and proceedings in this cause, and upon which said order was made, be sent to the United States Circuit Court of Appeals for the Second Circuit, by law provided, to the end that the errors complained of may be duly corrected and full and speedy justice done in the premises.

(Signed) MURRY GUGGENHEIM,
Petitioner.

(Signed) ELIHU ROOT, JR.,
(Signed) GEORGE E. CLEARY,
Attorneys for Petitioner,
31 Nassau Street, New York, New York.

229 [*Duly sworn to by Murry Guggenheim; jurat omitted in printing.*]

230 Before United States Board of Tax Appeals

[Title omitted.]

Præcipe for transcript of record

Filed January 11, 1932

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the clerk of the United States Circuit Court of Appeals for the Second Circuit, with reference to petition for review filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Board of Tax Appeals.

2. Pleadings before the Board of Tax Appeals, as follows:

231 (a) Petition for redetermination.

(b) Answer of respondent.

3. Opinion of the Board of Tax Appeals.

4. The stipulation of facts incorporated by the board in its opinion as its findings of fact.

5. The decision of the board.

6. The petition for review, filed by the petitioner in the above cause.

7. This præcipe.

ELIHU ROOT, JR.,
GEORGE E. CLEARY,
Attorneys for Petitioner.

Agreed to on behalf of the Commissioner of Internal Revenue.

C. M. CHAREST,
General Counsel for Bureau of Internal Revenue,
Attorney for Respondent.

232 [Clerk's certificate to foregoing transcript omitted in printing.]

233 In United States Circuit Court of Appeals for the Second Circuit

No. 345, October term, 1931

Argued April 4, 1932. Decided May 2, 1932

MURRY GUGGENHEIM, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

Before MANTON, L. HAND, and CHASE, Circuit Judges

Petitioner seeks a review of a determination imposing a gift tax in the year 1925. Determination reversed.

Elihu Root, jr., and George E. Cleary, both of New York City (Elihu Root, of New York City, of counsel), for petitioner.

G. A. Youngquist, Asst. Atty. Gen., Sewall Key and Hayner N. Larson, sp. assts. to Atty. Gen. (C. M. Charest, Gen. Counsel, Bureau of Internal Revenue, of Washington, D. C., and Prew Savoy, sp. atty., Bureau of Internal Revenue, of Washington, D. C., of counsel), for respondent.

Opinion

MANTON, Circuit Judge:

On June 28, 1917, the petitioner established by deed two trusts, one for a son and the other for a daughter, his only children. Two trustees, one an individual and the other a corporation, were named. The trusts were created for ten years, unless sooner terminated by the petitioner. A very substantial income was paid annually to the named beneficiaries and continued to the end of the ten-year period, at which time the principal of each trust was paid to the beneficiary, free of all restrictions. Provision was made for the children of the beneficiary, and in the event of death of either named beneficiary, if either died without children surviving, the petitioner was to receive the principal and accumulations. The right to alter or revoke each trust, except as to income received or accrued, and to direct the making of all changes in the securities included in the trust property, was retained by the petitioner. The trustees were authorized to do all things in connection with the trust, but subject to the petitioner's approval. Custody and title of the trust property were given to the trustees in their names. On May 5, 1921, petitioner gave to two individuals the power reserved to himself of directing and approving the management of the trusts. On July 13, 1925, he relinquished his power to alter, modify, or revoke the trusts. The corporate trust remained the same during this time but there were changes in the individual trustees. The petitioner never became

a trustee. The income and proceeds of the trusts were paid throughout to the beneficiaries. The trust funds or the profits were never used by the petitioner in any way for his personal gain or benefit.

The revenue act of 1924 (chap. 234, § 319; 43 Stat. 253 [26 U. S. C. A., § 1131, note]) provides for the imposition, for the calendar year 1924 and each year thereafter, of "a tax * * * upon the transfer by a resident by gift during any calendar year of any property wherever situated, whether made directly or indirectly. * * *" And section 320 of the act (26 U. S. C. A., § 1132, note) provides that if a gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. The commissioner imposed a tax on the trusts in question under
234 these sections, basing it upon the determination that when, on July 13, 1925, the petitioner relinquished his power to alter, modify, or revoke the trusts, he thereby made a transfer by gift during that calendar year of the property which he gave to the trustees by the deeds of 1917.

The statute is constitutional and valid as applied to gifts made after its effective date. (Bromley v. McGaughn, 280 U. S. 124, 50 S. Ct. 46, 74 L. Ed. 226.) But it is invalid as to gifts made prior to June 2, 1924. (Untermyer v. Anderson, 276 U. S. 440, 48 S. Ct. 353, 72 L. Ed. 615.)

The question presented here is not whether Congress had the power to impose a tax which would apply to the act of relinquishment of the power of revocation in the trusts, conveying property for the benefit of named beneficiaries, but whether Congress has done so. In the phrasing of the gift tax statute, Congress had omitted any reference to powers of revocation as taxable. In the interpretation of the taxing statute, we must strictly construe the language employed and may not extend the intention by implication beyond the clear import of the terms used, nor may we enlarge the operation of the statute so as to embrace matters not specifically pointed out. And in case of doubt, that construction should be made which is in favor of the taxpayer. (Smietanka v. First Trust & Savings Bank, 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 391; Crooks v. Harrelson, 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156; United States v. Merriam, 263 U. S. 179, 44 S. Ct. 69, 68 L. Ed. 240, 29 A. L. R. 1547; Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211.)

The act here, by force of the provisions of subdivisions (a) (2) and (b) (1) of section 321 of the act (26 U. S. C. A., § 1133, note) taxes transfers which are made by means of the creation of trusts, but the tax must be imposed at the time of transfer. Where, as here, the trust was created prior to the passage of the revenue act of 1924, and the termination of the power to alter, amend, or revoke occurred later, in 1925, the question is presented as to when there was an effective transfer by gift. Heretofore, when Congress has spoken with reference to the relinquishment of the power to revoke trusts, and desired to impose a tax, it has made it plain that the tax is imposed when the event occurs. In the estate tax provisions of

the revenue act of 1924 there appeared a new section (section 302 (d) of the act; 26 U. S. C. A., § 1094, note), specifically including in the gross estate the value of the property with respect to which the decedent had created a trust and had reserved power in himself to alter, amend, or revoke. But in the instant taxing statute, Congress made no mention of a desire to impose the gift tax at the time of relinquishment of the power of revocation. By section 402 (c) of the revenue acts of 1918 and 1921 (40 Stat. 1097; 42 Stat. 278), and section 302 (c) of the revenue act of 1924 (26 U. S. C. A., § 1094, note), it is specifically provided that transfers by the creation of trusts are to be taxed. Comparing these sections with what Congress stated in the statute here considered, it is evident that it did not intend the gift tax provision to cover a case where, in the year in question, there was no transfer of the property but merely a relinquishment of the power to alter, amend, or revoke the trusts theretofore created. The relinquishment of the power to alter, amend, or revoke a trust is not ordinarily regarded as a transfer of property by gift. (Tyler v. United States, 281 U. S. 497, 50 S. Ct. 356, 359, 74 L. Ed. 991, 69 A. L. R. 758; United States v. Field, 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617, 18 A. L. R. 1461; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908; Farmers' Loan & Trust Co. v. Bowers, 29 F. (2d) 14 (C. C. A. 2); Stone v. Hackett, 12 Gray (Mass.) 227.) The power to revoke is not a property right. (Jones v. Clifton, supra.) Congress is not restricted in levying taxes to transfers. As said in Tyler v. United States, supra: "The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights."

In referring to this act, the Supreme Court said in Blodgett v. Holden (275 U. S. 142, 48 S. Ct. 105, 72 L. Ed. 206) that it should be read as referring only to transactions taking place after it was passed. The right to alter or revoke a trust in no way invalidates it, nor does the power of revocation affect the legal title to the
235 property. (In re Dolan's Estate, 279 Pa. 582, 124 A. 176, 49 A. L. R. 858.) When the power of revocation was relinquished there was no transfer of the legal or beneficial title to the property involved, because that vested even though it was subject to termination at the will of the petitioner through his right to revoke. Reservation of the right to revoke, which was relinquished in 1925, was not included within the terms of the statute. Indeed, the relinquishment did not transfer but rather extinguished something. (In re Hall's Estate, 99 N. J. Law, 1, 125 A. 246, affirmed 100 N. J. Law, 405, 126 A. 924.) Thereafter that which had vested could not

be divested and the gift could no longer be recalled. Extinguishment of the power of revocation, standing alone from that which had previously passed, could not transfer anything of property to the beneficiaries. It merely completed the shifting of the economic benefits which had been in large part accomplished prior to 1924. Theretofore to impose a tax upon such relinquishment of the power would to be read into the statute something which is not there. It would make taxable an act which took place after the passage but which accomplished nothing by way of transfer as to that which had taken place prior to the passage of the act, namely, at the creation of the trust. The act clearly says that it applies only to transfers which are made during the taxable year.

The cases of Saltonstall v. Saltonstall (276 U. S. 260, 48 S. Ct. 225, 72 L. Ed. 565), Chase Nat. Bank v. United States (278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388), and Reinecke v. Northern Trust Co. (278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397), were cases in which the Supreme Court considered the constitutionality of taxing statutes. In the Saltonstall case the court accepted the interpretation of the state's highest court that a tax had been clearly imposed and it considered merely the right of the legislative branch of the State government to impose that tax. It was held that a reserved power of appointment left the transfer incomplete and subject to tax. The court had for consideration a trust which provided that it might be terminated in whole or in part by the donor with the concurrence of one trustee. After setting up the trusts, the Legislature of Massachusetts passed an act providing that failure to exercise a power of appointment should be taxable under the statute taxing inheritances. The words of the statute imposing this tax were clear and there arose no serious question of interpretation. The Supreme Court held that the statute was not retroactive and unconstitutional because something did occur on the extinguishment of the right of revocation which might be made the subject of a tax; that the power of appointment reserved by the donor left the transfer, as to him, incomplete and subject to a tax. The court held further that the act was not so unreasonable as to deprive the plaintiff of his property without due process of law, and that the extinguishment of the power was something on which the legislature could impose an excise tax. The statute before the court in that case (St. Mass. 1909, c. 527, § 8), read: "Whenever any person possessing such a power of apointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under the provisions of chapter five hundred sixty-three of the acts of the year one thousand nine hundred and seven and all acts in amendment thereof and in addition thereto shall be deemed to take place to the extent of such omission or failure."

The State court held that a tax having been levied, "the provisions of the trust instrument for change or termination of the trust by Peter C. Brooks with the consent of one trustee created a power of

appointment. * * *" The question there presented was quite different from that in the instant case. The statute had a specific provision imposing the tax and the only question before the Supreme Court was whether the provision was constitutional. In Chase Nat. Bank v. United States, supra, the question involved was the constitutionality of section 401 of the revenue act of 1921, as supplemented by that part of section 402 (f) (42 Stat. 277, 278) which provided that the gross estate should include all property "to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent during his own life." Section 401 imposed a tax upon the transfer of the net estate of every decedent. The court stated that the question presented was whether the termination at death of the power of decedent to dispose of the policies and their proceeds
236 and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax. In Reinecke v. Northern Trust Co., supra, the court considered two groups of trusts. One group containing two trusts became taxable under section 401 of the revenue act of 1921, imposing a tax upon the transfer of the net estate, and under section 402 (c), of the act (42 Stat. 278) providing for the inclusion in the gross estate of all property "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust * * * intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act). * * *" The two trusts were created before the passage of the statute imposing an estate tax. The settlor had reserved to himself the income for life and on his death the income of each trust was to be paid to a designated beneficiary until the termination of the trust, with remainders over. He reserved to himself alone a power of revocation of the trusts. The Supreme Court considered only the question whether or not the taxing statute, if applied to these two trusts, was unconstitutional and void because retroactive, within the decision of Nichols v. Coolidge (274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081), where it had been held that a similar section of the 1918 revenue act was retroactive and unconstitutional as applied to transfers completed by the creation of trusts prior to the enactment of any such taxing statute. The court considered that the two trusts were intended to take effect in possession or enjoyment at or after the decedent's death and were thus within the specific provision of the statute. It determined only that this provision could be constitutionally applied to trusts of this kind. In the three above cases all that was decided was that the specific provisions of the taxing statute clearly imposed the tax, and the only question was as to the constutionality of the provisions. The Supreme Court considered an income tax act in Corliss v. Bowers

(281 U. S. 376, 50 S. Ct. 336, 74 L. Ed. 916), where a husband created a trust to pay the income to his wife for life, with remainders over to his children, and reserved the power to revoke the trust. The tax was assessed on the donor under section 219 (g) of the revenue act of 1924 (26 U. S. C. A., § 960, note). The statute imposed a tax "where the grantor of a trust has * * * either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." There too a question of construction and constitutionality was presented to the Supreme Court, namely, whether the revenue act could be applied constitutionally to the grantor upon the facts there presented.

We think the reference to the transfer by gift of property means a transfer of title. The power to revoke was not a property right and the owner of such power had no title; when he surrendered the power, he did not transfer title. In United States v. Field (255 U. S. 257, 41 S. Ct. 256, 258, 65 L. Ed. 617, 18 A. L. R. 1461), a tax was imposed under section 201 of the 1916 act (39 Stat. 777) upon the transfer of the net estate of a decedent. The decedent died in 1914 leaving a trust, the income of which was to be paid to his wife, and after her death to such persons as she should by will appoint. She died in 1917, leaving a will appointing the income after her death to her children. The commissioner included in the gross estate of Mrs. Field the property covered by the power of appointment. The Supreme Court dealt with the construction of the statute and held that section 202 of the act (39 Stat. 777), providing "that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, * * * tangible or intangible, wherever situated: * * * (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *" had no provisions which applied to the exercise of a power of appointment. The court held that it was clear that section 202 (b) did not apply, and said: "It cannot, without undue laxity of construction, be made to cover a transfer resulting from a testamentary execution by decedent of a power of appointment over property not his own. It would have been
237 easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration." The difference between the Field case and the instant case, if there be any, is a matter of the degree of economic control over the property enjoyed by a holder of a power of revocation and by a holder of a life interest plus a general power of appointment. But in both the lack of ownership by the holder of the power is apparent.

The physical possession of the trust securities and the legal title thereto were transferred to the trustees in 1917, and equitable title was transferred to the beneficiaries at the same time. There was neither possession nor legal title, nor equitable title transferred by the extinguishment of the power of revocation. Whenever Congress has seen fit to tax powers of appointment or revocation, it has indicated that intent by clear language, and we must not abandon the authorities which have been consistently insistent upon strict construction of taxing statutes. As said in the Corliss case, supra: "But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed, the actual benefit for which the tax is paid." To impose this tax, we must say to the petitioner that the property was still his while he had to power to revoke, but when he gave up that power, he transferred the corpus by way of gift. This we can not do. Nor may we say that the income of the property was still his while he held the power to revoke and when the income went to the beneficiary it was a transfer of the income by way of gift. When he relinquished the power of revocation, he did not make the gift; that was made when he created the trust in 1917.

The order is reversed.

238 In United States Circuit Court of Appeals, Second Circuit

MURRY GUGGENHEIM, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed May 9, 1932

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said board in accordance with this decree.

WM. PARKIN, *Clerk.*

239 [File endorsement omitted.]

240 [Clerk's certificate to foregoing transcript omitted in printing.]

241 Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 36980. U. S. Circuit Court of Appeals, Second Circuit. Term No. 283. David Burnet, Commissioner of Internal Revenue, petitioner, vs. Murry Guggenheim. Petition for a writ of certiorari and exhibit thereto. Filed August 4, 1932. File No. 36980.

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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MURRY GUGGENHEIM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 313, 314:

> SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax * * * is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly * * *. (U. S. C., Title 26, Sec. 1131.)
>
> SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. * * * (U. S. C., Title 26, Sec. 1132.)

Regulations 67, promulgated under the Revenue Act of 1924 and relating to the Gift Tax under Title III, Part II, thereof:

> ARTICLE 1. *Transfers reached.* * * *
>
> The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated.

STATEMENT

On June 28, 1917, the respondent, a resident of New York, executed in New Jersey two trusts, one

for the benefit of his son (Ex. 2, R. 43–63) and one for the benefit of his daughter (Ex. 15, R. 125–144). The terms of each were much the same and provided that the trusts should continue for ten years, unless sooner terminated. (R. 46, 127.) The trustees were directed to pay annually to each beneficiary the income to the extent of $30,000 or such larger amount as the settlor at any time should provide. (R. 46–47, 127–128.) In each case it was provided that at the end of the ten-year period the trustees should turn over the principal and accumulated interest to the beneficiary, or, in case of his death, to his children; but if there should be no children surviving, then, in the case of the son's trust, to the settlor, and in the case of the daughter's trust, to the trustees of the son's trust, for the benefit of the latter. (R. 47–50, 128–131.) The settlor reserved to himself broad powers of control in respect of the trust property and its investment and administration. (R. 50–53, 131–135.) Among them was an unrestricted right to modify, alter, and revoke the trusts (Paragraph Eleventh of Exs. 2 and 15, R. 54–55, 136–137), and under it the settlor changed the terms of the trusts upon several occasions (Ex. 3, R. 64–68; Ex. 8, R. 74–89; Ex. 9, R. 90–99; Ex. 10, R. 100–105; Ex. 13, R. 109–118; Ex. 14, R. 118–124; Ex. 16, R. 145–149; Ex. 21, R. 155–169; Ex. 22, R. 169–178; Ex. 25, R. 182–191; Ex. 26, R. 191–196).

On July 13, 1925, the settlor modified the trusts by eliminating this power of revocation. (Ex. 14, R.

122; Ex. 26, R. 194.) The fair market value on that date of the securities constituting the corpus account in the trust for the son was $6,304,548.25, which amount included $61,644.63 representing interest accrued but not yet received and not reflected in the market quotations of the securities comprising the corpus account. The fair market value at that time of the corpus account of the daughter's trust was $6,805,915.19, which amount included $54,904.09 of such interest. (R. 35–36.)

The respondent filed with the Collector a gift tax return for the year 1925, but included therein no part of said amounts. (R. 36.) The petitioner determined that the whole thereof should have been included (Ex. 1, R. 37–43), and accordingly, on March 8, 1929, mailed to the respondent a notice of a deficiency in tax of $2,465,681.20 (R. 23–24).

Before the Board it was agreed that the amounts of interest accrued but not received, amounting together to $116,548.72, should be deducted from the total value of the corpus of the two trusts and the tax reduced accordingly. (R. 36.) Upon review by the Board the determination of the Commissioner was approved, except as modified by said reduction, and a decision entered that there is a deficiency of $2,436,544.02. (R. 221.) The whole of this amount is in issue.

The Circuit Court of Appeals reversed the decision of the Board. (R. 239.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the respondent's relinquishment of his power of revocation was not a transfer of property within Section 319 of the Revenue Act of 1924.

2. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. This case presents the question whether or not the principles laid down by this Court in respect of transfers of property at death are applicable to transfers of property during life. In *Chase National Bank* v. *United States*, 278 U. S. 327, and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, this Court held that for the purpose of taxing transfers at death a power of disposition represents a substantial right in the property subject to the power, and that regardless of technical considerations of title termination of that power by death constitutes a transfer of the property. In the instant case the Circuit Court of Appeals held that for the purpose of taxing gifts *inter vivos* termination of such a power does not constitute a transfer of property; transfer of title is necessary, the court said, and a power of disposition is not property or an interest in property, so that regardless of the substantial rights it may represent there is nothing which can pass upon its termination. The decision is thus apparently in conflict with the prin-

ciples laid down by this Court in what we believe are analogous, applicable, and controlling cases.

Though disclaiming any intention so to hold, the effect of the decision of the Circuit Court of Appeals nevertheless is to declare that Congress is without power to impose an excise as for a gift *inter vivos* upon termination of a power of revocation. A gift tax is an impost upon the exercise of a right incident to ownership (*Bromley* v. *McCaughn,* 280 U. S. 124, 136), and if, as the court below held, the gift in this case was consummated in 1917, when the trusts were created (R. 239), and the subsequent relinquishment of the power of revocation "did not transfer but rather extinguished something" and "could not transfer anything of property" (R. 235, 236), it is obvious that no matter how the statute might have been drawn it would have been ineffectual to impose a valid tax upon occurrence of the later event.

2. As a necessary corollary to its holding that no transfer of property took place upon the respondent's relinquishment of his power of revocation the Circuit Court of Appeals held that the gift took place in 1917, when the trusts were created. This conclusion is directly opposed to *Basket* v. *Hassell,* 107 U. S. 602, where it was said that there can be no valid gift *inter vivos* unless it "divest the owner of all present control and dominion over it, absolutely and irrevocably."

In holding that after the creation of the trust there was nothing capable of later transfer, the decision of the Circuit Court of Appeals is in apparent conflict with the principle of cases like *Poe* v. *Seaborn,* 282 U. S. 101, and *Corliss* v. *Bowers,* 281 U. S. 376, which state in respect of a donor of property who reserves a power of revocation that (*Poe* case, p. 116):

> While he has technically parted with title, yet he in fact retains ownership, and all its incidents.

3. The decision of the court below is directly in conflict with the decision of the Court of Claims in *Means* v. *United States,* 39 F. (2d) 748, certiorari denied, 282 U. S. 849. In that case, as in this, the creator of a trust relinquished the reserved right to revoke after the gift tax provisions of the Revenue Act of 1924 became effective. The Court of Claims held that the case was controlled by *Chase National Bank* v. *United States, supra,* and *Reinecke* v. *Northern Trust Co., supra.* It regarded those decisions as establishing that the freeing of the property from the possibility of the exercise of the right of revocation effected the transfer which was the subject of the tax, and said that the fact that in those cases death was the event that terminated the right was immaterial.

4. The consistent administrative construction of the Revenue Act involved is opposed to the decision

of the court below, and such construction has received implied legislative approval. It is believed that the question presented is of sufficient general importance to justify review by this Court.

Wherefore it is respectfully submitted that the petition should be granted.

WILLIAM D. MITCHELL,
Attorney General.

AUGUST, 1932.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 197–220) is reported in 24 B. T. A. 1181. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 233–239) is reported in 58 F. (2d) 188.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 9, 1932. (R. 239.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the question presented, specification of errors, a statement of the case, and the statutes and regulations involved will be found in the petition.

ARGUMENT

The question in this case is whether respondent's relinquishment of his power of revocation of the trusts was a transfer of property, either direct or indirect, and hence within Section 319 of the Revenue Act of 1924, *supra,* which imposed a tax "upon the transfer * * * by gift * * *

of any property * * *, whether made directly or indirectly." The Circuit Court of Appeals held that the relinquishment was not such a transfer, upon the ground that a transfer of property within the statute means a transfer of title and that since a power of revocation gives its holder no title its surrender is not a transfer of property, and on the further ground that the gift was made when the trusts were created, not when the settlor terminated his control over them.

This holding and the reasons adduced in support of it we believe are unsound and the result of a misinterpretation of and departure from applicable and controlling principles laid down by this Court in analogous cases.

In *Chase National Bank* v. *United States*, 278 U. S. 327, as in the case at bar, a tax was in terms imposed upon a transfer. The only difference is that in that case the transfer taxed was of net estate at death, which by the statute included certain described "miscellaneous items of property" (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348), while here it is of property without limitation. In both cases title to the property in question had "vested" in the donee or the trustee; all the donor retained was a power of disposition, which was described specifically in neither statute. The question in the *Chase* case (pp. 334–335), as here, was whether the termination of that power was a transfer. This Court held that it was, and in

consequence the tax was upheld against constitutional objections based (p. 329) upon the same reasoning advanced by the court in this case. Termination of the power, this Court said (p. 335), was "no less a transfer" of the property subject to it than a transfer effected in other ways. It cited *Saltonstall* v. *Saltonstall,* 276 U. S. 260, as authority for the proposition that the freeing of the property of the possibility of exercise of the power "effected a transfer," because, as said in that case (p. 271), it is "the shifting of the economic benefits and burdens of property" which is important, not the conveyance of technical title. Such a power while outstanding, the *Chase* case pointed out (pp. 336–337), left the gift incomplete as to both donor and donee, and not until its termination was transfer of the property complete. Termination, it was said (p. 339), operated "as an effective transfer."

If these things were true in the *Chase* case they would seem to be no less true here. In each an excise was laid upon the privilege of transferring property; in the one case at death, in the other during life. Had there been no transfer in the *Chase* case there could have been no tax. And the fact that there was a transfer there should be conclusive that there was one here; the principle is the same irrespective of the time of exercise of the privilege.

Like the *Chase* case so *Reinecke* v. *Northern Trust Co., supra,* involved the estate tax title of the

Revenue Act of 1921, c. 136, 42 Stat. 227. There again, as in the *Chase* and *Saltonstall* cases, this Court held that termination of a power of disposition, in this instance in the form of a power of revocation like that at bar, constituted a transfer of the property subject to the power, and a tax was thus upheld against constitutional objections based (p. 345) upon the fact that, as here, title had long since passed out of the donor.

These cases emphasize that the time of transfer of technical legal or equitable title, which the court below deemed controlling in the instant proceeding (R. 238), is not decisive. As this Court said in *Tyler* v. *United States,* 281 U. S. 497, 503, an estate tax case:

> The question * * * is, not whether there has been, in the *strict* sense of that word, a "transfer" of the property by the death of the decedent, * * * but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights. (Italics ours.)

And this Court there held accordingly that termination by death of a tenancy by the entireties, though in a strict sense not a transfer of the property to the survivor, was such in substance, and upheld the tax against constitutional objections

based on the argument (p. 502) that "no right in such property is transferred by death, but the survivor retains only what he already had," which is in effect the theory upon which the court below decided this case.

If, viewed in its substance, there was a transfer of property in the *Tyler* case when one tenant died there was no less a transfer here when the taxpayer relinquished his power of disposition. In the former the survivor's rights were in no way subject to control or diminution at the hands of the decedent, while at bar the taxpayer had an interest great enough to permit him to revest title in himself and which this Court has said is the equivalent of ownership. *Bullen* v. *Wisconsin,* 240 U. S. 625, 631; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Poe* v. *Seaborn,* 282 U. S. 101, 116.

In the *Corliss* case the taxpayer had a power of revocation similar to that of the taxpayer here. He argued that he was not subject to tax upon income from the trust property because (p. 378)—

> The legal estate was in the trustee and the equitable interest in the wife,

and that therefore he had no interest in the property. But this Court answered (p. 378) that—

> taxation is not so much concerned with the refinements of title as it is with the actual command over the property,

and that "from the point of view of taxation there would be no difference" whether or not the taxpayer in a strict sense had title.

> The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power.

So long as he retained his power of control the respondent at bar was taxable upon the trust income, because that power made him owner of the corpus. *Corliss* and *Poe* cases, *supra*. See *Hoeper* v. *Tax Commission*, 284 U. S. 206; *Burnet* v. *Leininger*, 285 U. S. 136, 142. When he relinquished his right of control and rid himself of the ensuing liability, what he did was to take ownership out of himself and place it in another, which was in the fullest sense a transfer of property and therefore within the statute.

There is no good reason for supposing that the word "transfer" was used in the statute involved in this case in a sense any narrower than that in which it was used in the estate tax provision involved in the *Chase* and *Reinecke* cases. On the contrary every intendment should be indulged in favor of a like meaning; for the two kinds of taxes were merely parts of a single coherent taxing scheme, the gift tax being "adopted into the Revenue Act of 1924 as correlative to the estate tax." (S. R. No. 52, 69th Cong., 1st Sess., p. 9.)[1] What is a transfer

[1] The reports of the Committee on Ways and Means of the House and the Committee on Finance of the Senate in respect of the gift tax provisions of the Revenue Act of 1932 give further support to the view that the word "transfer" in the 1924 Act should not be used in the sense of referring only to the conveyance of technical legal or equitable title. Though subdivision (c) of Section 501 of the 1932 Act specifically covers, among other things, situations like that at

for purposes of the one would seem to be no less a transfer for purposes of the other.[2]

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bar, it was not a part of the Bill at the time these committee reports were submitted, but was added subsequently by amendment from the floor of the Senate. (Cong. Rec., 72d Cong., 1st Sess., Vol. 75, No. 137, p. 12015.) So what the committees said in respect of the meaning of the word "transfer" in subdivisions (a) and (b), which in substance are the same as Section 319 of the 1924 Act, is strongly indicative of its proper meaning here. They said (H. R. No. 708, 72d Cong., 1st Sess., pp. 27–28; S. R. No. 665, 72d Cong., 1st Sess., pp. 39–40):

"The terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value.

"The words 'transfer * * * by gift' and 'whether * * * direct or indirect' are designed to cover and comprehend all transactions (subject to certain express conditions and limitations) whereby, and to the extent (sec. 503) that, property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment. For example, * * * (7) where A creates a revocable trust naming B as beneficiary, a gift to B of the corpus is effected when A relinquishes the power to revoke or the power is otherwise terminated in B's favor (the income payments to B in the interim being gifts from A in the calendar years when received)."

It is probable that subdivision (c), in so far as it deals with situations like that involved here, was declaratory and was specifically intended to overcome the effect of the decision in this case, opinion in which was rendered on May 2, 1932. (R. 233.) Subdivision (c) was offered and adopted May 31, 1932. (Cong. Rec., *supra*.) Congress had intended, the committee reports show, that subdivisions (a) and (b) should apply to termination of a power of revocation, as had been declared by the regulations and by the Court of Claims in *Means* v. *United States*, *supra*, in respect of Section 319 of the 1924 Act.

[2] Any other view would, as this case illustrates, result largely in defeat of the purpose of the gift tax in cases of

This was the interpretation placed by the Commissioner upon the statute here involved at the time of its enactment (Article 1 of Regulations 67, *supra*), before the respondent relinquished his power of revocation. Furthermore, with this interpretation before it, Congress, for the purpose of reducing the tax rate, reenacted Section 319 as Section 324 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 86, without any change of language. This is evidence of legislative approval of the interpretation made. *Brewster* v. *Gage,* 280 U. S. 327, 337; *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 235.

Means v. *United States* (C. Cls.), 39 F. (2d) 748, certiorari denied, 282 U. S. 849, which involved the same question as this case under substantially similar facts, is in direct conflict with the decision below. The principles laid down in the *Chase, Reinecke,* and *Saltonstall* cases were deemed controlling. The court said (p. 753):

> In these cases the precise question determined by the court was the effective date, within the meaning of the taxing statutes, of the transfer of property where the donor in trust instruments had reserved to himself the unrestricted rights of revocation.
>
> The court held in each case that the transfer was made when the possibility of the exercise of the rights of revocation ceased to

---

trusts created before the 1924 Act, which was to prevent evasion of the estate tax by distributions during life. See *Tyler* case, *supra*, p. 505.

exist; that until that time the gift was incomplete both to the donor and to the donee.

United States v. *Field,* 255 U. S. 257, upon which the court below largely relied (R. 238), is not in point. There the estate upon the transfer of which the tax was laid was limited by the statute to property falling within either of two specified classes. And since the property over which the decedent had and exercised a power of appointment did not fall within either class it of course followed that it was not for that purpose part of the decedent's estate. Simple lack of ownership of the property by the decedent was not the ground of the decision, but rather lack of ownership because prescribed as a requisite by the statute.

The court below also attached significance to the fact that in the 1924 Act, trusts subject to powers of revocation were for the first time specifically mentioned in the estate tax provisions (Sec. 302 (d)), while that was not done in the gift tax title, and concluded therefrom that Congress intended that the two should be treated differently. (R. 235.) The inference is not a tenable one. The death duty was imposed upon the net *estate* (gross estate less deductions), and it was of course necessary for purposes of measuring the tax (*Tyler* case, *supra,* pp. 504–505) to prescribe what should be included in the estate. Cf. *Northern Trust Co.* case, *supra,* p. 348. But the gift tax was laid upon the transfer of *property,* and in that situation

there was of course no similar necessity for definition. In any event, Section 302 (d), so far as here important, merely clarified the law, or, more exactly, duplicated the preceding subdivision (c). This latter provision was like Section 402 (c) of the 1921 Act, which, though it did not in terms cover termination of a power of revocation, nevertheless applied to such an act. *Reinecke* case, *supra.* So Section 302 would have reached a termination of a right of control without the aid of subdivision (d).[3]

The opinion of the court below closes with the statement that the transfer by gift in this case was made in 1917, when the taxpayer created the trusts.[4] This conclusion is of itself, we submit, strongly indicative that the court's decision is erroneous. Section 319 taxed property passing by gift *inter vivos,* and it is well established both in this and other Federal courts, as well as in the courts of New York, where the taxpayer resided, and of New Jersey, where the trust agreements were executed, that until all dominion and control over the

[3] It has been held that Section 219 (g) of the 1924 Act, likewise a new provision, but dealing with the taxation of the income of revocable trusts, was declaratory. *McCauley* v. *Commissioner* (C. C. A. 5th), 44 F. (2d) 919, 920; *Dickey* v. *Burnet*, 56 F. (2d) 917, 920 (C. C. A. 8th).

[4] This view is of course unavoidable under the court's theory; for the question presented, the court correctly said (R. 234), was "as to when there was an effective transfer by gift," and if the transfer did not take place in 1925, when the power of revocation was terminated, it must of course have taken place in 1917.

property given passes finally from the donor there can validly be no such gift. *Basket* v. *Hassell,* 107 U. S. 602, 614; *Bowen* v. *Kutzner,* 167 Fed. 281, 296–297 (C. C. A. 4th); *Copland* v. *Commissioner,* 41 F. (2d) 501, 504 (C. C. A. 7th); *Edson* v. *Lucas,* 40 F. (2d) 398, 404 (C. C. A. 8th); *Ridden* v. *Thrall,* 125 N. Y. 572, 579; *Curry* v. *Powers,* 70 N. Y. 212, 217; *In re Humphrey's Estate,* 181 N. Y. S. 169, 170; *In re Ogsbury's Estate,* 39 N. Y. S. 978; *Provident Institution for Savings* v. *Sisters of the Poor,* 87 N. J. Eq. 424, 429, affirmed as *Provident Institution for Savings* v. *Mead,* 88 N. J. Eq. 349; *Matthews* v. *Hoagland,* 48 N. J. Eq. 455, 485. It seems quite impossible properly to regard the transfer as having taken place at any other time than when the power of revocation was relinquished.

CONCLUSION

The decision of the Circuit Court of Appeals is erroneous. It is in direct conflict with the decision of the Court of Claims in *Means* v. *United States,* 39 F. (2d) 748, certiorari denied, 282 U. S. 849. The decision of the court below appears also to be in conflict in principle with the decisions of this Court in *Chase National Bank* v. *United States,* 278 U. S. 327, and *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, which are believed to be controlling in principle. It also appears to be contrary to certain other decisions of this Court referred to in the foregoing brief. The amount in-

volved in this case is very substantial, and it is believed that the question presented is of sufficient general importance to justify review by this Court. The petition for certiorari should be granted.

Respectfully submitted.

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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MURRY GUGGENHEIM

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 92) is reported in 24 B. T. A. 1181. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 109) is reported in 58 F. (2d) 188.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 9, 1932. (R. 115.) The petition for a writ of certiorari was filed August 4, 1932, and was granted October 17, 1932. (R. 116.) The ju-

risdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the gratuitous termination of a power to revoke a trust is subject to the tax which is imposed by Section 319 of the Revenue Act of 1924 on a "transfer * * * by gift * * * of any property * * *, whether made directly or indirectly.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 30–40.

STATEMENT

The facts of this case are not in dispute. They were stipulated (R. 10–92), and the Board of Tax Appeals incorporated this stipulation in its opinion by reference (R. 92). They may be summarized as follows:

On June 28, 1917, the respondent, a resident of New York, executed in New Jersey two trusts, one for the benefit of his son (Ex. 2, R. 20) and one for the benefit of his daughter (Ex. 15, R. 58). The terms of each were much the same and provided that the trusts should continue for ten years, unless sooner terminated. (R. 21, 59.) The trustees were directed to pay annually to each beneficiary the income to the extent of $30,000 or such larger amount as the settlor at any time should provide.

(R. 21, 59.) In each case it was provided that at the end of the ten-year period the trustees should turn over the principal and accumulated income to the beneficiary; if the beneficiary died before the end of the ten-year period, the principal was to be paid to his children; but if there should be no children surviving, then the principal and accumulated income was to be paid, in the case of the son's trust, to the settlor, and in the case of the daughter's trust, to the trustees of the son's trust, for the benefit of the latter. (R. 22–23, 60–61.) The settlor reserved to himself broad powers of control in respect of the trust property and its investment and administration. (R. 23–25, 61–63.) Among them was an unrestricted right to modify, alter, and revoke the trusts except as to income received or accrued. (Paragraph Eleventh of Exs. 2 and 15, R. 25, 63.)[1]

On July 13, 1925, the settlor modified the trusts by eliminating this power of revocation. (Ex. 14, R. 54; Ex. 26, R. 89.) The fair market value on that date of the securities constituting the corpus of the trust for the son was $6,304,548.25, which amount included $61,644.62 representing interest accrued but not yet received and not reflected in the market quotations of the securities comprising the

[1] On several occasions the respondent exercised his power to modify and alter the trusts. These alterations included a change of the duration of the trusts (Ex. 8, R. 34; Ex. 21, R. 72), and the transfer of the powers of management and administration from the respondent to others (Ex. 9, R. 41; Ex. 22, R. 79). Other amendments are also shown by the record. (Ex. 3, R. 29; Ex. 10, R. 46; Ex. 13, R. 50; Ex. 14, R. 54; Ex. 16, R. 67; Ex. 25, R. 85; Ex. 26, R. 89.)

corpus. The fair market value at that time of the corpus of the daughter's trust was $6,805,915.19, which amount included $54,904.09 of such interest. (R. 16.)

The respondent filed with the Collector a gift tax return for the year 1925, but did not include in it any part of these amounts. (R. 17.) The petitioner determined that the whole thereof should have been included (Ex. 1; R. 17), and accordingly, on March 8, 1929, mailed to the respondent a notice of a deficiency in tax of $2,465,681.20 (R. 10).

Before the Board it was agreed that the amounts of interest accrued but not received, amounting together to $116,548.72, should be deducted from the total value of the corpus of the two trusts and the tax reduced accordingly. (R. 16.) Upon review by the Board, the determination of the Commissioner was approved, except as so modified, and a decision was entered that there is a deficiency of $2,436,544.02. (R. 104.) The taxpayer appealed to the Circuit Court of Appeals for the Second Circuit, which reversed the decision of the Board. (R. 115.)

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the respondent's relinquishment of his power of revocation was not a transfer of property within Section 319 of the Revenue Act of 1924.

2. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

By Section 319 of the Revenue Act of 1924 (*infra*, p. 36), a tax is imposed "upon the transfer * * * by gift * * * of any property wherever situated, whether made directly or indirectly. * * *" The only question in this case is whether the termination of the respondent's power to revoke the trusts was a transfer, either direct or indirect, within the meaning of this statute.

Article 1 of Regulations 67, relating to the gift tax, expressly provides that the relinquishment of a power to revoke is taxable. This regulation was promulgated more than eight months before the respondent in this case terminated his power of revocation, and it has remained in effect unchanged ever since. We submit that this is a reasonable and necessary provision, and should be enforced.

Furthermore, with this interpretation before it, Congress, for the purpose of reducing the tax rate, reenacted Section 319 of the Revenue Act of 1924 as Section 324 of the Revenue Act of 1926 (*infra*, p. 36), without any change of language. This reenactment of the statute in the face of the administrative construction amounts to a legislative recognition and approval of the statute as so construed.

II

This Court has decided that the termination of a power of revocation is in substance a transfer. The decisive question involved in *Chase National Bank* v. *United States,* 278 U. S. 327, is the same as the one in the case at bar. The controlling question there was whether termination of a power of disposition was a *transfer* of the property subject to the power. A similar result was reached in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. These cases establish that the time of transfer of the technical legal or equitable title is neither decisive nor material.

The power which the respondent retained over the trust property was sufficient to enable him to revest title in himself. This Court has held that such a power is the equivalent of ownership. *Bullen* v. *Wisconsin,* 240 U. S. 625, 631; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Poe* v. *Seaborn,* 282 U. S. 101, 116.

The *Chase National Bank* and *Northern Trust cases* are not inapplicable on the ground that the issues there were directed to constitutionality, while here the question raised is solely one of interpretation. In each of those cases this Court, in order to sustain the tax, was required to hold that there was a *transfer* of property. *Heiner* v. *Donnan,* 285 U. S. 312.

III

The word "transfer" was used in the gift tax provisions of the statute in the same sense as it was used in the estate tax provisions. The two kinds of taxes were imposed by the same act and were merely parts of a single coherent taxing scheme. The statute was drawn to reach the passage of property by gift in either case, and what is a transfer for purposes of the estate tax is no less a transfer for purposes of the gift tax.

The court below attached significance to its statement that Section 302 (d) of the Revenue Act of 1924 (*infra*, pp. 33–34) for the first time specifically mentioned powers of revocation in the estate tax provisions, while this was not done in the gift tax sections. But the court's premise is too broad. Section 302 (d) related to powers to *change*, not merely to powers to *revoke*. Property subject to powers of revocation was taxable as a part of the gross estate under the earlier estate tax acts. Moreover, even if the court's premise had been sound, its conclusion would not follow. The estate tax imposed by the Revenue Act of 1924, as in the other revenue acts, was imposed upon the transfer of the *net estate*, and it was of course necessary for the purpose of measuring the tax to prescribe what should be included in the net estate. But the gift tax was laid upon the transfer of *property*, so that there was no similar necessity to define the subject of the transfer upon which the tax was imposed.

IV

The conclusion of the court below that the gifts were completed in 1917 is plainly erroneous and is inconsistent with a later decision by the same court. Although it is undoubtedly true that a trust subject to a power of revocation is valid as a trust, it does not follow that such a trust has the incidents of a completed gift. The contrary has been established by this Court.

In a decision more recent than its decision in the case at bar, the court below dealt with the taxability, as part of the estate of a decedent, of property placed in trust by him for the benefit of other persons, but as to which he reserved a right to change the beneficiaries in favor of others than himself. *Porter* v. *Commissioner,* 60 F. (2d) 673, certiorari granted November 14, 1932, No. 466, October Term, 1932. The court, contrary to its position in the present case, relied upon the fact that so long as the settlor retained his power to "divest" the beneficiaries there was no gift to them.

ARGUMENT

By Section 319 of the Revenue Act of 1924 (*infra,* p. 36), a tax is imposed for each taxable year—

> upon the transfer by a resident by gift during such taxable year of any property wherever situated, whether made directly or indirectly, * * *.

The only question in this case is whether the termination of the respondent's power to revoke the

trusts was a transfer, either direct or indirect, within the meaning of this statute.

The Circuit Court of Appeals concluded, in accordance with the taxpayer's argument, that termination of the settlor's power of revocation was not made taxable by Section 319. The court based its decision on the ground that the transfer of property made taxable by the statute is a transfer of technical title, and that, since a power of revocation gives its holder no title, its surrender is not a transfer of property. The court also concluded that the gifts were made when the trusts were created, not when the settlor relinquished his control over them. In reaching this result the court disregarded the express provisions of the regulations, and failed, we submit, to apply the principles established by this Court in analogous cases.

I

THE REGULATIONS EXPRESSLY PROVIDE THAT THE RELINQUISHMENT OF A POWER TO REVOKE IS TAXABLE, AND THESE REGULATIONS HAVE RECEIVED LEGISLATIVE APPROVAL

By Section 1001 of the Revenue Act of 1924 (*infra*, p. 36) authority was expressly granted to the Commissioner of Internal Revenue to issue regulations with the approval of the Secretary of the Treasury. In accordance with this authority Regulations 67, relating to the gift tax, were duly promulgated on November 8, 1924, more than eight months before the respondent in this case termi-

nated his power of revocation. Article 1 of these regulations (*infra*, pp. 38–40) contains the following express provision applicable to the situation in this case:

> The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated.

This regulation, we submit, was a reasonable and necessary provision. It is obvious that when a person creates a revocable trust, and then terminates his power of revocation, a transfer has occurred at some time; and the statute expressly applies to transfers "whether made directly or indirectly." But the real transfer is not effected by the mere creation of a revocable trust. The settlor of such a trust retains complete control over the property; the income from the property is taxable to him (*Corliss* v. *Bowers*, 281 U. S. 376); and on the settlor's death the property is taxable as a part of his estate (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339). Not until the power is terminated does the gift become final and effective. These considerations, developed more at length below in this brief, make it plain, we believe, that the Commis-

sioner's regulation was not only a reasonable but a necessary one. The regulation has now been in force without change for over eight years. Since the regulation is reasonable and has been consistently followed by the administrative authorities, it should be followed and enforced by this Court. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Ex parte Reed*, 100 U. S. 13.

Furthermore, with this interpretation before it, Congress, for the purpose of reducing the tax rate, reenacted Section 319 of the Revenue Act of 1924 as Section 324 of the Revenue Act of 1926 (*infra*, p. 36), without any change of language. This reenactment of the statute so construed by the administrative authorities amounts to a legislative recognition and approval of that construction. *National Lead Co.* v. *United States*, 252 U. S. 140; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Universal Battery Co.* v. *United States*, 281 U. S. 580; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *United States* v. *Kirby Lumber Co.*, 284 U. S. 1.[2] Since the respondent concedes that the sole question involved is one of construction (Br. in Opp. 6), this circumstance seems decisive.

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[2] Although the gift tax provisions of the Revenue Act of 1932 contain specific reference to the termination of a power of revocation, the legislative history shows plainly that this was not intended to represent a change in the law as interpreted by the regulations under the 1924 Act. See note 6, *infra*, pp. 21–22.

Not only has the regulation received legislative approval, but its correctness is shown by an examination of this Court's decisions in closely related cases, which are discussed below.

II

THIS COURT HAS DECIDED THAT THE TERMINATION OF A POWER OF REVOCATION IS IN SUBSTANCE A TRANSFER

The decisive question involved in *Chase National Bank* v. *United States*, 278 U. S. 327, is the same as the one in the case at bar, except that there the question related to the termination of a power of control at death while here it relates to termination during life. In the *Chase National Bank case*, as here, the tax involved was in terms imposed upon a *transfer*.[3] The only difference is that there the tax was laid on "the transfer of the net estate,"

[3] In his brief in opposition (pp. 4–5), the respondent contended that in the *Chase National Bank case* and in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, this Court was not dealing with a statute applying to transfers. This contention is obviously incorrect. By Section 401 of the Revenue Act of 1921 (*infra*, p. 30), the tax involved in those cases was imposed upon transfers just as in Section 319 now in issue. In the *Chase National Bank case* this Court stated specifically (p. 334) that "the statute in terms taxes transfers," and it concluded its decision by saying (p. 339) that "It is the *transfer* * * * which is the subject of the tax." (Italics ours.) The Court also said (p. 337): "Obviously, the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee."

and the net estate by definition in another section of the statute included certain described "miscellaneous items of property" (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348), while here the tax is laid on "the transfer * * * of any property," without limitation. In both cases title to the property in question had passed from the donor and become "vested" in others; all the donor retained was a power of disposition. In neither statute was the termination or relinquishment of such a power specifically described or referred to. It is true that the statute defining the "net estate" involved in the *Chase National Bank case* specifically referred to insurance; but the express provision of Section 401 of the Revenue Act of 1921 made it plain that this applied only to insurance of which there was a *transfer* at death. The controlling question in the *Chase National Bank case* (pp. 334–335), as at bar, was whether termination of that power was a *transfer* of the property subject to it. This Court held that it was a transfer, and in consequence upheld the tax against constitutional objections based upon exactly the same reasoning as that advanced by the respondent and by the court below in this case. Termination of the power, this Court said (p. 335), was "no less a transfer" of the property subject to it than a transfer effected in other ways. It cited *Saltonstall* v. *Saltonstall*, 276 U. S. 260, as authority for the proposition that the freeing of the property of

the possibility of exercise of the power "effected a transfer," because, as said in that case (p. 271), it is "the shifting of the economic benefits and burdens of property" which is important, not the conveyance of technical title. Such a power, while outstanding, the *Chase National Bank case* pointed out (pp. 336–337), left the gift incomplete as to both donor and donee, and not until its termination was the transfer of the property complete. Termination, it was said (p. 339), operated "as an effective transfer."

If these things were true in the *Chase National Bank case* they are no less true here. In each an excise was laid upon the privilege of transferring property; in the one case at death, in the other during life. Had there been no transfer in the *Chase National Bank case* there could have been no tax. And the fact that there was a transfer there is conclusive that there was one here; the principle is the same irrespective of the time when the privilege of revocation is terminated.

Like the *Chase National Bank case, Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, *supra,* involved the estate tax title of the Revenue Act of 1921. As in the case at bar, the statute made no specific reference to the termination of a power of disposition. Again this Court held, as in the *Chase National Bank* and *Saltonstall cases,* that the termination of such powers constituted (p. 345) "transfers of the corpus" or property subject to the powers, and

accordingly sustained the tax against constitutional objections based (p. 345) upon the ground, relied upon here by the court below (R. 114), and by the respondent, that technical title had long since passed out of the donor.

These cases establish that the time of transfer of technical legal or equitable title is neither decisive nor material. As this Court said in *Tyler* v. *United States*, 281 U. S. 497, 503:

> The question here * * * is, not whether there has been, in the *strict* sense of that word, a " transfer " of the property by the death of the decedent, * * * but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights. (Italics ours.)

And this Court there held accordingly that termination by death of a tenancy by the entirety, though in a *strict* sense not a transfer of rights in property since technical title did not pass, was such in substance, and upheld the tax against constitutional objections based on the argument (p. 502) that "no right in such property is transferred by death, but the survivor retains only what he already had," which is in effect the theory upon which the court below decided this case.

If, viewed in its substance, there was a transfer of property in the *Tyler case* when one tenant died, there was certainly no less a transfer of property here when the taxpayer relinquished his power of disposition. In the former the survivor's rights were in no way subject to control or diminution at the hands of the decedent, while at bar the taxpayer had an interest great enough to permit him to revest title in himself and which this Court has said is the equivalent of ownership. *Bullen* v. *Wisconsin,* 240 U. S. 625, 631; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Poe* v. *Seaborn,* 282 U. S. 101, 116. In the case last cited this Court said in respect of a donor of property who reserves a power of revocation (p. 116) that—

> While he has technically parted with title, yet *he in fact retains ownership, and all its incidents.* (Italics ours.)

In the *Corliss case* the taxpayer had a power of revocation similar to that retained by the taxpayer here. He argued that he could not constitutionally be subjected to tax upon the income from the trust property because he had neither the legal nor the equitable estate and therefore had no interest in the property. But this Court answered (p. 378) that—

> taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—

and that "from the point of view of taxation there would be no difference" whether or not the taxpayer in a strict sense had title. The Court continued:

> The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power.

So long as he retained his power of control the respondent at bar was taxable upon the trust income because that power made him substantial owner of the corpus.[4] *Corliss* v. *Bowers, supra; Poe* v. *Seaborn, supra.* When he relinquished his right of control and rid himself of the ensuing liability he accomplished the transfer of substantial ownership and dominion from himself to another. This was in the fullest sense a transfer of property.

The *Chase National Bank, Northern Trust* and *Saltonstall cases* are not inapplicable because, as the court below held, there the issues were directed to the point of constitutionality (R. 112–113) while here, as the court said (R. 110), the question is solely one of interpretation, the taxpayer having waived all constitutional questions. In each of these cases the basis of the claim that the statute was unconstitutional was that there was no *transfer* of

[4] Section 219 (g) of the Revenue Act of 1924, a new provision in that Act, expressly made the income taxable to the settlor; but it has been held that this provision was merely declaratory, and that the income in such a case was likewise taxable to the settlor under earlier Acts. *McCauley* v. *Commissioner*, 44 F. (2d) 919, 920 (C. C. A. 5th); *Dickey* v. *Burnet*, 56 F. (2d) 917, 920 (C. C. A. 8th), certiorari denied October 10, 1932.

In his brief in the Circuit Court of Appeals the respondent stated (pp. 5–6) that he gave up his right to revoke the trusts in order to escape tax upon the income.

property upon termination of the donor's reserved power of disposition because title to the property had already passed from him and become "vested" in others. This is precisely the argument the respondent at bar advances for the purpose of taking himself outside the scope of Section 319.[5] But in each of the cases referred to this Court held that there was a *transfer* of property upon termination of the power at death.

That the tax involved in the *Chase National Bank* and *Northern Trust cases* was a tax imposed on a *transfer* is made clear not only by the plain words of the statute but also by the decisions of this Court that Congress can not constitutionally impose an estate tax on a transaction which is not in substance a transfer at death. *Heiner* v. *Donnan,* 285 U. S. 312. See also *Knowlton* v. *Moore,* 178 U. S. 41, 47; *Stebbins* v. *Riley,* 268 U. S. 137, 141.

There is nothing in this Court's decision in *Tyler* v. *United States,* 281 U. S. 497, *supra,* to indicate the contrary, as the court below seems to have thought. (R. 111.) That case is not authority for the proposition that a death duty may be imposed by Congress without a transfer of property rights.

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[5] In his petition to the Board of Tax Appeals (R. 2–3) the taxpayer contended that Section 319 was unconstitutional for the same reasons which he now advances to support his argument that he is outside the terms of the statute. The claim of unconstitutionality has since been abandoned, but the argument remains the same.

It held only that a shifting of technical title is not an essential element of what is in substance a transfer. The opinion states (p. 503) in addition to what has already been quoted (*supra*, p. 15):

> Taxation as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants * * * did not have the effect of *passing to the survivor substantial rights, in respect of the property,* theretofore never enjoyed by such survivor. (Italics ours.)

In the *Tyler case,* moreover, as we have already pointed out, the decedent did not alone have power to dispose of the property in question, while here the taxpayer had an absolute and unqualified right to direct its disposition.

The precise question involved in this case was decided by the Court of Claims in *Means* v. *United States,* 69 C. Cls. 539, certiorari denied, 282 U. S. 849. It was there held that the termination by a settlor of his right to revoke a trust was a transfer of the trust property and thus taxable under Section 319. The court accepted the principles announced in the *Chase National Bank, Northern Trust,* and *Saltonstall cases* as conclusive, saying (p. 548):

> In these cases the precise question determined by the court was the effective date, within the meaning of the taxing statutes,

of the transfer of property where the donor in trust instruments had reserved to himself the unrestricted rights of revocation.

The court held in each case that the transfer was made when the possibility of the exercise of the rights of revocation ceased to exist; that until that time the gift was incomplete both to the donor and to the donee.

III

THE WORD "TRANSFER" WAS USED IN THE GIFT TAX PROVISIONS OF THE STATUTE IN THE SAME SENSE IT WAS USED IN THE ESTATE TAX PROVISIONS

The court below held (R. 114) that the word "transfer" was used in Section 319 so as to be applicable only to passage of the technical legal or equitable title. But there is nothing to indicate that the word "transfer" was used in Section 319 in a sense narrower than that in which it was used in the estate tax provision involved in the *Chase National Bank* and *Northern Trust cases.* On the contrary, there is every reason to suppose the word was intended to have the same meaning in the two sections, for the two kinds of taxes were imposed by the same Title of the same Act (see pp. 33–36, *infra*), and were parts of a single coherent taxing scheme, the gift tax being "adopted into the revenue act of 1924 as correlative to the estate tax." S. Rep. No. 52, 69th Cong., 1st Sess., p. 9. It seems absurd to say, as respondent's position requires, that termination by death of a power of control of property is a transfer of that property, and that termination by a voluntary act a week earlier is not.

The law was drawn to reach the passage of property by gift in either case, and what is a transfer for purposes of the estate tax would seem to be no less a transfer for purposes of the gift tax, especially since Congress used the same word—"transfer"—in respect of both, and in the same Act, and the same Title of that Act.[6] Moreover, as has been pointed out in Point I above, this was the contemporaneous administrative construction placed on the statute by the Commissioner at the time of its enactment (Article 1 of Regulations 67, *infra*, pp.

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[6] The reports of the Committee on Ways and Means of the House and the Committee on Finance of the Senate in respect of the gift tax provisions of the Revenue Act of 1932 give further support to the view that the word "transfer" in the 1924 Act should not be used in the sense of referring only to the conveyance of technical legal or equitable title. Though subdivision (c) of Section 501 of the 1932 Act (*infra*, pp. 37–38) specifically covers, among other things, situations like that at bar, it was not a part of the Bill at the time these committee reports were submitted, but was added subsequently by amendment on the floor of the Senate. (75 Con. Rec., Part 10, p. 11630.) So what the committees said in respect of the meaning of the word "transfer" in subdivisions (a) and (b), which in substance are the same as Section 319 of the 1924 Act, is strongly indicative of its proper meaning here. They said (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 27–28; S. Rep. No. 665, 72d Cong., 1st Sess., pp. 39–40):

"The terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value.

"The words 'transfer * * * by gift' and 'whether * * * direct or indirect' are designed to cover and comprehend all transactions (subject to certain express condi-

38–40), months before the respondent relinquished his power of revocation.

The court below also attached significance to its statement that in Section 302 (d) of the Revenue Act of 1924 (*infra*, pp. 33–34) trusts subject to powers of revocation were for the first time specifically mentioned in the estate tax provisions, while this was not done in the gift tax title. The court concluded from this fact that Congress intended that the two should be treated differently. (R. 110–111.) But the court's premise is too broad. Property subject to powers of revocation was taxable as a part of the gross estate under Section 402 (c) of

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tions and limitations) whereby, and to the extent (sec. 503) that, property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment. For example, * * * (7) where A creates a revocable trust naming B as beneficiary, a gift to B of the corpus is effected when A relinquishes the power to revoke or the power is otherwise terminated in B's favor (the income payments to B in the interim being gifts from A in the calendar years when received)."

Subdivision (c), in so far as it deals with situations like that involved here, was declaratory and was specifically intended to overcome the effect of the decision in this case, the opinion in which was rendered on May 2, 1932. (R. 109.) Subdivision (c) was offered and adopted May 31, 1932. (Cong. Rec., *supra*.) Congress had intended, the committee reports show, that subdivisions (a) and (b) should apply to termination of a power of revocation, as had been declared by the regulations and held by the Court of Claims in *Means* v. *United States*, *supra*, under Section 319 of the 1924 Act.

the Revenue Act of 1921, and by similar provisions in the two earlier Acts. *Reinecke* v. *Northern Trust Co.* 278 U. S. 339, *supra,* holding revocable trusts taxable under the estate tax, was decided under the 1921 Act. There was therefore no need to add Section 302 (d) to the 1924 Act to reach powers of *revocation;* that Section had a far different objective, which may be seen if its precise language is examined. It made the estate tax applicable to property transferred on a trust which "was subject * * * to any *change* through the exercise of a power." (Italics ours.) Obviously, Section 302 (d) was intended to reach a much broader class of trusts than those subject only to a power of revocation.[7]

Moreover, even if the court's premise were sound its conclusion does not follow. The estate tax imposed by Section 301 of the Revenue Act of 1924, as in the other revenue acts, was imposed upon the transfer, not of *property,* but of the *net estate*—a statutory concept, and it was of course necessary to prescribe what classes of property constituted the net estate. Cf. *Reinecke* v. *North-*

[7] The real purpose of Section 302 (d) is disclosed in such cases as *Brady* v. *Ham,* 45 F. (2d) 454 (C. C. A. 1st), and *Porter* v. *Commissioner,* 60 F. (2d) 673 (C. C. A. 2d), certiorari granted, November 14, 1932, where the settlor reserved a power to alter or amend the trusts but not so as to make himself beneficiary. Such a power is not a power to revoke; but it is a power to *change,* and comes within the ambit of Section 302 (d).

ern Trust Co., 278 U. S. 339, 348, *supra*. But the gift tax was laid upon the transfer of *property*, so that there was no similar necessity to define the subject of the transfer upon which the tax was imposed. The respondent's argument that the *Chase National Bank* and *Reinecke cases* did not involve a tax on transfers (Br. in Opp. 7–9) grows out of his refusal to recognize this distinction.

United States v. *Field*, 255 U. S. 257, upon which the court below largely relied (R. 114), is illustrative of this point. There a widow was given a general power of appointment by will over property of her husband, which the Government sought to include in her estate for estate tax purposes. As in all the revenue acts, the tax was imposed upon "the transfer of the net estate," and in the next succeeding sections it was prescribed what the *net estate* should include. The property over which the widow had and exercised the power of appointment did not fall within any provision of the latter section, and it of course followed, as this Court held, that it was not taxable since it was not included by the statute in its definition of the net estate. The *Field case* is therefore not in point here; the ground of the decision was not, as the court below seems to have thought (R. 114), that there was no transfer, but rather that the property involved was not defined by the statute as a part of the decedent's net estate.

The *Tyler case* also illustrates the necessity of observing the distinction between a tax laid upon the "transfer of the net estate" and one laid, as at bar, upon the " transfer of property." It was there said (p. 502):

> Section 201 imposes the tax "upon the transfer of the net estate "; and if that section stood alone, the inclusion of such property [property held on a tenancy by the entirety] in the gross estate of the decedent probably could not be justified by the terms of the statute.

This language the respondent contends (Br. in Opp. 7–9) is authority for the proposition that the statute now in question does not reach termination of powers of revocation. Plainly this is not so. The language quoted says only that without the aid of the section prescribing what should be included in the "net estate" it would be doubtful whether property held on such a tenancy would be part of the net estate. The Court's meaning is made clear by the language which immediately follows (p. 502):

> But section 202 definitely includes the property and brings it within the reach of the words imposing the tax; so that a basis for the constitutional challenge is present.

As in the case at bar, the tax was imposed upon the *transfer.*

IV

THE CONCLUSION OF THE COURT BELOW THAT THE GIFTS WERE COMPLETED IN 1917 IS PLAINLY ERRONEOUS AND IS INCONSISTENT WITH A LATER DECISION BY THE SAME COURT

The opinion of the court below closes with the statement that the gifts in this case were made in 1917, when the taxpayer created the trusts.[8] (R. 115.) This conclusion is of itself, we submit, strongly indicative of the error in the court's decision. Section 319 taxed property passing by gift during life, whether made directly or indirectly, and it is of course beyond question that there can be no gift at law until all dominion and control over the property given passes finally from the donor.

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[8] This view is, of course, unavoidable under the court's theory; for the question presented, the court correctly said (R. 110), was "as to when there was an effective transfer by gift," and if the transfer did not take place in 1925, when the power of revocation was terminated, it must of course have taken place in 1917.

Though disclaiming any intention so to hold, the effect of the decision of the Circuit Court of Appeals nevertheless is to declare that Congress was without power to impose an excise as for a gift *inter vivos* upon termination of a power of revocation. A gift tax is an impost upon the exercise of a right incident to ownership (*Bromley* v. *McCaughn*, 280 U. S. 124, 136), and if, as the court below held, the gift in this case was consummated in 1917 when the trusts were created (R. 115), and the subsequent relinquishment of the power of revocation "did not transfer but rather extinguished something" and "could not transfer anything of property" (R. 111, 112), it is obvious that no matter how the statute might have been drawn it would have been ineffectual to impose a valid tax upon occurrence of the later event.

Basket v. *Hassell,* 107 U. S. 602, 614. Equally beyond question is the proposition, on which the respondent cites so many cases (Br. in Opp. 11–13), that a valid trust can be created although a power to revoke is reserved. But it does not follow, as the respondent assumes, that such a trust has the incidents of a completed gift, no matter how valid and effective it may be as a trust. The contrary has been established by this Court. The revocable trust involved in *Corliss* v. *Bowers,* 281 U. S. 376, *supra,* was admittedly valid and effective, but the income from it was taxable to the settlor; the revocable trusts involved in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, *supra,* were likewise valid without question, but their corpus was taxed as a part of the settlor's gross estate.

In a decision more recent than its decision in the case at bar, the court below dealt with the taxability, as part of the estate of a decedent, of property placed in trust by him for the benefit of other persons but as to which he reserved a right to change the beneficiaries in favor of others than himself. *Porter* v. *Commissioner,* 60 F. (2d) 673, certiorari granted, November 14, 1932, No. 466, October Term, 1932. The taxpayer there argued much the same as does the respondent here. But the court, contrary to its position upon this point in its decision in this case, relied upon the fact that as long as the settlor retained his power to "di-

vest" the beneficiaries, there was no gift to them. It said (p. 674):

> A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends.[9]

Manifestly it is quite impossible properly to regard the transfers in question as having taken place at any other time than when the powers of revocation were relinquished. It was only then that the gifts were made.[10]

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[9] It is interesting to note also that the opinion in the *Porter case* states that the *Field case* was decided upon the ground which we urge as distinguishing it from the present case. It said (p. 674): "*United States* v. *Field*, 255 U. S. 257, arose under the Act of 1916 (39 Stat. 756 as amended 39 Stat. 1000), which did not comprise general powers, and was decided for that reason." This, of course, is not consistent with the view taken by the court below in the present case. (R. 114.)

The decision in the *Porter case* acknowledges also that the *Northern Trust case* was decided upon the ground which we here urge. It said of the decision in that case: "The settlor had reserved a general beneficial power to revoke, whose termination by his death was treated as a taxable transfer."

[10] If, as the petitioner contends, the transfer took place when the trusts were created, it is interesting to consider what would have been the situation if the Gift Tax Act had been in effect at that time. Under the taxpayer's argument the tax would have been payable then. What would have been the situation if thereafter the settlor should have exercised his power of revocation? Would the taxpayer then have been entitled to a refund on the ground he had made no gift, although *ex hypothesi*, he had made a gift?

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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NOVEMBER, 1932.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, 279, provided in part as follows:

TITLE IV.—ESTATE TAX

* * * * *

SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: [then follows a schedule of percentages]

* * * * *

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time

of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part

of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * *

The Revenue Act of 1924, c. 234, 43 Stat. 253, 303, 304, 313, 314, 339, provides in part as follows:

TITLE III

PART I.—ESTATE TAX

* * * * *

SEC. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States: [then follows a schedule of percentages]. (U. S. C., Title 26, Sec. 1092.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair

consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of Part I of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be ex-

cepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

* * * * *

PART II.—GIFT TAX

SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer of a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: [then follows a schedule of percentages]. (U. S. C., Title 26, Sec. 1131.)

SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year. (U. S. C., Title 26, Sec. 1132.)

* * * * *

SEC. 1001. The Commissioner, with the approval of the Secretary, is authorized to prescribe all needful rules and regulations for the enforcement of this Act. (U. S. C., Title 26, Sec. 1245.)

The Revenue Act of 1926, c. 27, 44 Stat. 9, 86, 87, provides in part as follows:

SEC. 324. (a) Section 319 of the Revenue Act of 1924 is amended to read as follows:

"SEC. 319. For the calendar year 1924 and the calendar year 1925, a tax equal to the

sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: " [then follows a schedule of percentages smaller than those provided for in Section 319 of the Revenue Act of 1924, *supra,*].

(b) Subdivision (a) of this section shall take effect as of June 2, 1924.

SEC. 325. Any tax that has been paid under the provisions of Title III of the Revenue Act of 1924 prior to the enactment of this Act in excess of the tax imposed by such title as amended by this Act shall be refunded without interest. (U. S. C. App., Title 26, Sec. 1121.)

The Revenue Act of 1932, c. 209, 47 Stat. 169, 245, 246, provides in part as follows:

TITLE III.—GIFT TAX

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax

shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

SEC. 502. COMPUTATION OF TAX.

The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years. [Then follows a "Gift Tax Rate Schedule."]

REGULATIONS

Regulations 67, relating to the gift tax, promulgated November 8, 1924, under the Revenue Act of 1924, provides in part as follows:

ARTICLE 1. *Transfers reached.*—At common law the term "gift" is applied only to voluntary transfers of property made without consideration or compensation therefor.

But the taxing act with which these regulations deal employs the term "gift" in a wider and more comprehensive sense, for, while it embraces transactions which at common law amount to gifts, it goes further by including sales and exchanges for less than a fair consideration in money or money's worth. (See sec. 320.) Hence, the statute reaches and taxes all transfers of property made during the calendar year (other than the gifts specified in par. (3) of subdivision (a) and in par. (2) of subdivision (b) of sec. 321), to the extent that they are donative in character and exceed the authorized deductions.

The subject of the gift may consist of any species of property or interest therein, whether legal or equitable. Thus, for example, a taxable transfer may be effected by a transfer of real estate, by the declaration of a trust, by the forgiveness of an indebtedness, the payment of another's debt, the assignment of a judgment, or the transfer of cash, certificates of deposit, or of Federal, State, or municipal bonds. A sale or exchange for a consideration reducible to a money value which is less than a fair consideration amounts to a gift, within the meaning of the statute, to the extent that the fair market value of the property, at the time of the transfer, exceeds the consideration received. If the consideration is not reducible to a money value it is to be wholly disregarded. A transfer which is neither a sale nor an exchange does not involve a gift if there is a valid, even if not an adequate, consideration for the transfer.

The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income

of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated.

The statute embraces donative transfers made by corporations, associations, partnerships, trusts, and estates, as well as those made by individuals. (See art. 25.)

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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MURRY GUGGENHEIM

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The respondent bases a large part of the argument in his brief on a discussion of the state of the law in 1924 and 1925. We desire in this brief to answer some of these contentions.

Neither the state of the law in 1925 nor the advice which counsel may have given the respondent at that time would seem to be a conclusive bar against the Government. We, of course, agree with the respondent's statement (Br. 7) that he "was

entitled to consult counsel"; but we call attention to certain material which investigation in 1925 must have disclosed.

As long ago as 1821 Lord St. Leonards had written, "To make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." Sugden, Powers, 3d ed., 434. This sentence merely stated a rule of law which too often, both before and since, has been obscured by legal verbiage.[1] This fact that a general power over property is the equivalent of absolute ownership was as true in 1925 as it was in 1821. The language of Lord St. Leonards had been quoted by this Court and made the basis of its decision in the year 1916 in *Bullen* v. *Wisconsin*, 240 U. S. 625, 630. This case was, of course, available in 1925.

An effort is now made to distinguish that case on the ground that it involved only a question of constitutionality under the Fourteenth Amendment. (Br. 21.) That is, of course, true, but it avails the respondent nothing. This Court's opinion shows that the reason the Wisconsin statute was held constitutional was that a general power over property is equivalent to a fee, and the termination of such a power is thus in effect a transfer of the property.

Counsel for the respondent refer (Br. 6–7) to the power which he retained when he created the

[1] See, for example, the quotations on pp. 11–12 of the respondent's brief.

trusts as "technical" and "unfortunate and useless." But an examination of the trust instruments themselves shows that these characterizations are hardly justified. The powers to revoke the trusts are couched in the broadest language, disclosing fully the complete dominion of the respondent over the corpus. (Par. Eleventh of Exs. 2 and 15, R. 25, 63.) Of course it is immaterial whether the respondent exercised these powers to revoke or ever intended to exercise them; through them he was the complete master of the trust property, as much as if he had retained its legal ownership in fee. The respondent's intimate relation to the trusts and the trust property is shown not only by these powers, but also by his frequent exercise of the many other powers which he reserved over the property. (See p. 3 of our main brief.)

Furthermore, as we have pointed out in our main brief (pp. 9–11), the regulations of the Treasury Department, *promulgated more than eight months before the respondent terminated his power of revocation,* expressly provided that the termination of such a power was subject to the gift tax. Regulations 67, Art. 1.[2]

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[2] Counsel state (Br. 7) that one of the reasons which induced the respondent to terminate his powers was the Treasury's ruling that the payments of income under the trusts were subject to gift tax as long as he retained the powers to revoke. It is significant that this ruling was contained in the same article of the same regulations which held the termination of general powers to be taxable. Regulations 67, Art. 1.

We have argued in our main brief that this regulation was a reasonable and proper one, and we need not repeat that argument here. We have also argued that this regulation was in effect approved by Congress when it reenacted the statute in the Revenue Act of 1926 without change except as to the rate of tax. Counsel for the respondent take exception to this argument (Br. 23–24) and cite *Iselin* v. *United States,* 270 U. S. 245, 251. But the quotation which the respondent prints from that case shows its inapplicability, for this Court said that the administrative construction there involved "was neither uniform, general, nor long-continued." Here the regulation has been in force without change for more than eight years; it has been consistently applied by the Treasury Department; and at least one taxpayer has been subjected to tax under it only after an unsuccessful effort to invoke the jurisdiction of this Court. *Means* v. *United States,* 69 C. Cls. 539, certiorari denied, 282 U. S. 849.

Counsel refer (Br. 37–38) to "the sanctity inherent in decisions which have endured for years" and to "retroactive interpretation which falls like a trap upon those who have acted beyond recall." These references seem hardly relevant. A taxpayer who acts in the teeth of an explicit Treasury regulation certainly acts at his own risk and is scarcely in a position to urge that the statute taxing him is being given a "retroactive interpretation."

Four other points in the respondent's discussion of the law in 1925 deserve comment.

(1) In our original brief we said (p. 27) that it is "beyond question * * * that a valid trust can be created although a power to revoke is reserved." The ten quotations set out on pp. 8–11 of the respondent's brief appear to add nothing to this statement. Nor do the citations of *In re Dolan's Estate,* 279 Pa. 582, and *In re Hall's Estate,* 99 N. J. L. 1, aid the respondent's case. Those decisions are, of course, directly contrary to the decision of this Court in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. And they did not stand unchallenged among the State decisions even in 1925. See, for example, *Estate of Bullen,* 143 Wis. 512; *In re Fulham's Estate,* 96 Vt. 308.

(2) Support is sought in the fact that in 1925 and now " a donor who creates a revocable trust must pay a stock transfer tax on all shares of stock in the trust when the trust is set up" and that " The Government has never attempted to impose the stock transfer tax upon the surrender of a power to revoke." (Br. 3, 19–20.) But the stock-transfer tax presents no analogy. That tax is laid on the "transfers of legal title to shares," not on the transfer of their beneficial ownership. Revenue Act of 1924, Sec. 800, Schedule A, par. 3; Revenue Act of 1932, Sec. 723. The present case is in this respect not distinguishable from any case like *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339,

where the fact that the creation of a trust of stock is subject to the stock-transfer tax does not prevent the termination at death of a power to revoke the trust from being subject to an estate tax.

(3) The respondent leans heavily on *United States* v. *Field*, 255 U. S. 257, and states (Br. 17) that this Court there held "that because she did not have title, because she did not in the common law sense, own the property, there was no 'transfer' from her to the appointees." There is no basis for this statement. This Court did not hold in the *Field case* that the exercise of the power did not result in a transfer. The tax in that case was laid, not, as here, on transfers of property, but only on "the transfer of the net estate." What this Court held was that the appointed property was not a part of the decedent's "net estate." This plainly appears from the quotation from the *Field case* printed by the respondent at p. 16 of his brief; in fact, the execution of a power of appointment is expressly referred to in this quotation as "a transfer." (See third full line from end of quotation on p. 16 of respondent's brief.)[3]

(4) Reference is made (Br. 22) to rulings of the Bureau of Internal Revenue concerning the

[3] A similar refusal to recognize the distinction between a *transfer of property* and a *transfer of the net estate* pervades the respondent's discussion of recent decisions of this Court at pp. 25–36 of his brief. See pp. 23–25 of our original brief.

taxability under the estate tax provisions of the Revenue Acts of 1918 and 1921 of property held in a revocable trust. It is stated that the Bureau first ruled that such property should be included in the donor's estate, and that "This ruling the Bureau rescinded after argument in 1923 (T. D. 3487, II–1 C. B. 303.[4])" This statement suggests the inference that the Bureau ruled in 1923 that property held in a revocable trust was not taxable. An examination of Treasury Decision 3487, which the respondent cites, shows that this inference is not warranted. The Bureau did rule for the time being (erroneously, as we now know) that a revocable trust was not *ipso facto* subject to the estate tax; but it held that such a trust would be taxable if its creator in fact intended it to take effect at death. Moreover, the very vacillation of the Bureau on this question should have served as a warning to the respondent.

CONCLUSION

The state of the law in 1925 (even if it were material) was such that the respondent was not justified in assuming that the termination of his powers to revoke would not be subject to the gift tax. Subsequent decisions of this Court, cited in our main brief, show that the then existing Treasury

[4] The correct reference is II–1 C. B. 301.

regulation holding such a termination taxable was a reasonable and correct construction of the statute.

The judgment of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

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DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

MURRY GUGGENHEIM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR MURRY GUGGENHEIM IN OPPOSITION.

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BRIEF FOR MURRY GUGGENHEIM IN OPPOSITION.

The judgment of the Circuit Court of Appeals for the Second Circuit (R. 239) and the opinion on which that judgment is based (R. 233, 58 F. (2d) 188) deal with a single and very simple question.

In 1917 Murry Guggenheim created two revocable trusts,

one for his son and one for his daughter.[1] In 1924 Congress passed a Revenue Act, Section 319 of which imposed a tax upon "the transfer * * * by gift * * * of any property * * *".[2] Thereafter, in 1925, Murry Guggenheim surrendered his powers to revoke these trusts. The only question before the Court below was whether the surrender of those powers was a transfer by gift of property. The Court below decided that it was not.

The Petitioner's Claim of a Conflict With Means v. United States.

The petitioner claims in support of his application that the decision below is in conflict with the decision of the Court of Claims in *Means* vs. *United States*, 39 F. (2d) 748. That is true. But the question on which the conflict exists cannot recur. It is not a question of general interest. The gift tax section under which our case arises was repealed six years ago. (Section 1200(a), Act Feb. 26, 1926, c. 27, 44 Stat. 125.) A new gift tax has been enacted but Congress has changed the wording so that the new Act, instead of taxing simply transfers by gift of property now also specifically taxes the relinquishment of powers to revoke. (Section 501, Revenue Act of 1932, Public No. 154—72 Congress, see Appendix, p. 19, for text of statute). Congress has changed the language of the gift tax section

[1] Note: It is stated on page 3 of the petition that broad powers of control of the investment and administration of the trust property were reserved, but these had been given up long before the Act of 1924 was passed (R. 34).

[2] (Act June 2, 1924, c. 234, 43 Stat. 313; U. S. C., Title 26, Sec. 1131, See Appendix, p. 19, for text of statute.)

in respect of powers to revoke just as it formerly changed the language of the income tax and estate tax sections in respect of powers to revoke. It will never go back to the older and narrower form of gift tax any more than it will go back to the older and narrower form of estate tax or income tax. The question will not recur. It is not one of general interest. It relates to the interpretation of a repealed and now obsolete statute. Its decision will furnish no guide for the determination of future cases for such cases cannot arise.

Certiorari was applied for in the *Means* case, *supra,* by the taxpayer and was denied, 282 U. S. 849. In that case the Government closed its brief in opposition to the granting of the writ by saying:

> "* * * The gift tax is no longer in force, and the question in this case can not arise under Revenue Acts subsequent to that of 1926. As far as we can learn, the point has been raised in the case of only one other taxpayer. This case, which involves a substantial amount, is now before the Board of Tax Appeals." (No. 207, October Term, 1930. Brief for the United States in Opposition, p. 6.)

The one other case there referred to was the case now at bar. The question involved can no more recur now than it could then—it is no more interesting or important now than it was then.

If the mere fact of a conflict between the Court of Claims and the Circuit Court of Appeals is enough in itself, without any showing of general interest or likelihood of recurrence, then the petitioner should have his writ, but not otherwise; for the petitioner's other arguments in support of his application are unsound. Let us consider these arguments.

The Petitioner's Further Claims of Conflict.

The petitioner claims on pages 5 and 6 of his petition and on pages 10 to 14 of his brief that there is a conflict between the decision below and the decisions of this Court in the cases of *Chase National Bank* vs. *United States,* 278 U. S. 327, and *Reinecke* vs. *Northern Trust Co.,* 278 U. S. 339. This claim is absolutely unfounded. What are these cases as to which a conflict is claimed?

In the *Chase Bank* case a man took out a policy of life insurance payable to his wife, reserving a right to change the beneficiary. Thereafter the Revenue Act of 1921 (Section 402(f), 42 Stat. 278) by clear and specific words, provided that the amount in excess of $40,000 receivable on life insurance taken out by the decedent and payable to beneficiaries other than his executor should be taxed as part of the decedent's gross estate.* Then the insured died without making any change of beneficiaries. The Court held that the insurance should be included in the gross estate, in spite of the fact that the Act was passed after the policy was taken out. The Court in supporting this decision talked about the extinction by death of the right to change beneficiaries as being the equivalent of a transfer of the insurance. But this language was used, not in construing a tax provision applying to "transfers", but in supporting the constitutionality of a clearly applicable and specific section requiring the taxation of the insurance. The Court dealt

* (Note: There is an apparent attempt to deny this at the bottom of page 10 of the petitioner's brief.)

only with the question of constitutionality. It said on page 334:

> "In the present case there is no question of the construction of the statute. The tax is plainly imposed by the explicit language of Sections 401 and 402(f) if those sections are to be constitutionally applied."

In the *Reinecke* case a donor created two trusts reserving the power of revocation and reserving the income to himself for life. Then the Revenue Act of 1921 was passed. Section 402(c) of this act required the inclusion, for tax purposes, in the gross estate of a decedent of property "To the extent of any interest therein of which the decedent has at any time made a transfer, * * * in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *". Thereafter the donor died without having exercised his power of revocation.

The Court considered that the trusts involved were clearly intended to take effect in possession or enjoyment at death within the provisions of Section 402(c) and that the only question was a constitutional one. The Court said on page 345 of its opinion:

> "As to the two trusts, it is argued that since they were created long before the passage of the statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, * * *"

The Court was considering that question and that question alone. It held that the extinction of the right to revoke after the passage of the statute was enough to support the constitutionality of the Act.

The question presented in these two cases was not whether Congress had used language purporting to impose the tax but whether it had power to impose the tax.

The case at bar, on the other hand, involves no question of constitutional power. It is admitted that the Congress could have taxed the surrender of the power to revoke had it chosen to insert in the statute appropriate language to that effect (as it has since done in the new gift tax Act). In the case at bar we have a simple question of interpretation—does the surrender of a power to revoke a trust fall within the words "transfer * * * by gift * * * of * * * property"? In the words of the Court below:

> "The question presented here is not whether Congress had the power to impose a tax which would apply to the act of relinquishment of the power of revocation in the trusts, conveying property for the benefit of named beneficiaries, but whether Congress has done so."

The petitioner in his brief below admitted the difference in the issues raised by the *Chase* and *Reinecke* cases and the case at bar. He said:

> "The petitioner [now the respondent] argues that these cases are not in point because the issue there raised was that of constitutionality, whereas here the petitioner presents no such question but only one of construction. It is true that the ultimate issues raised are not the same, but the attack upon the constitutionality of the statutes in the cases cited was grounded upon the contention that there was in fact no transfer and in order to sustain the statute it was necessary to hold, as the court did and which the quotations show that there was in fact in each case a transfer after the effective date of the statute involved" (page 13).

In the last sentence quoted lies the basic fallacy of the petitioner's whole argument. It was *not* necessary to hold that there had been "a transfer * * * of * * * property" in order to sustain the constitutionality of the statutes in question. There did *not* have to be a transfer of property after the date of the statute. There merely had to be some change in the situation which could constitutionally be made the subject of a tax. Congress is not restricted to transfers in levying taxes. Congress may tax one for remaining a member of a club, for using a foreign built yacht, for riding in a parlor car, for going to the theatre, for drawing a check, or for the mere doing of business.

This Court has explained the situation very clearly in a case later than and similar to the *Chase* and *Reinecke* cases. In *Tyler* vs. *United States,* 281 U. S. 497, the Court in a unanimous opinion said that while the extinction by death of the rights of a tenant by the entirety would not as a matter of interpretation have been taxable under a statute simply imposing a tax on transfers, it could be taxed under a statute specifically applying to such an extinction because the constitutional power to tax did not depend on there being a transfer of property. On pages 502 and 503 the Court said:

> "Section 201 imposes the tax upon the 'transfer of the net estate'; and if that section stood alone, the inclusion of such property [the property subject to the tenancy by the entirety] in the gross estate of the decedent probably could not be justified by the terms of the statute. But Section 202 definitely includes the property and brings it within the reach of the words imposing the tax so that a basis for the constitutional challenge is present. * * *

> "The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death had brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which the Congress may call a transfer tax, a death duty or anything else it sees fit) * * *."

There is an almost incredible misuse of this case on page 12 of the petitioner's brief. The Court in the *Tyler* case was dealing with two sections of the Estate Tax of 1916, Section 201 and Section 202 (39 Stat. 777). Section 201 was a simple section, imposing in general terms a tax on the *transfer* of the net estate. It was like the section of the Gift Tax involved in the case at bar. If the Court in the *Tyler* case had said that a transfer of property in the strict sense was not necessary in order to support a tax under this Section 201, the *Tyler* case would have been an authority against us and would have been in conflict with the decision below. But the Court does not say this. It says just the *opposite* to this. It says on page 502 of its opinion:

> "Section 201 imposes the tax upon the "transfer of the net estate"; and if that section stood alone, the inclusion of such property [the interest of the tenant by the entirety] in the gross estate of the decedent probably could not be justified by the terms of the statute."

Then the Court passes to Section 202, a section specifically imposing a tax upon the extinction of the right of a tenant by the entirety, a section under which there arises a con-

stitutional question exactly like the constitutional questions arising in the *Chase* and *Reinecke* cases. The Court says:

> "But Section 202 definitely includes the property and brings it within the reach of the words imposing the tax so that a basis for the constitutional challenge is present."

It is of this section and of this constitutional question that the Court says in the latter part of the quotation that a transfer in the strict sense of the word is not necessary.

The petitioner omits the earlier part of the quotation and makes it appear that the words which the court used of Section 202 and in regard to a question like the question in the *Chase* and *Reinecke* cases, were used of Section 201 and in regard to a question like that in our own case.

The petition at the top of page 7, claims a conflict between the decision below and the principle of the cases of *Poe* vs. *Seaborn,* 282 U. S. 101, and *Corliss* vs. *Bowers,* 281 U. S. 376.

Corliss vs. *Bowers* was a constitutional case involving the power of Congress by clear and specific language to tax a donor on the income of a revocable trust. It differs from our own case in exactly the same way as the *Chase* and *Reinecke* cases.

It is difficult to see what the case of *Poe* vs. *Seaborn* has to do with the point now under discussion. That was a case in which this Court held that a husband resident in California was not taxable on the entire community income of himself and his wife. It was a case decided in favor of the taxpayer.

The petitioner claims that these cases establish the principle that the retention of the right to revoke made the donor the owner of the corpus (Petitioner's brief, p. 14). That conclusion is directly in conflict with *Jones* vs. *Clifton,* 101 U. S. 225, and the other cases cited on page 12 below. In support of his theory the petitioner quotes on page 7 of his petition the following language from the *Poe* case:

> "While he has technically parted with title, yet he in fact retains ownership, and all its incidents."

The petitioner should have begun the quotation earlier:

> "The Corliss case raised no issue as to the intent of Congress, but as to its power. We held that where a donor retains the power at any time to revest himself with the principal of the gift, Congress may declare that he still owns the income. While he has technically parted with title, yet he in fact retains ownership, and all its incidents."

Does not the completed quotation indicate clearly that the result in the *Corliss* case would have been different if the case had been dealing with the intent of Congress and not with its power, if Congress had not specifically declared that the income of the trust was to be taxed to the donor?

A further reason given by the petitioner for the granting of the writ, is that the decision below is in conflict with *Basket* vs. *Hassel,* 107 U. S. 602, where the court said that there could be "no valid gift *inter vivos* unless it divest the owner of all personal control and dominion over it, absolutely and irrevocably". This point is based on an elementary misconception. It is true, of course, that a tech-

nical gift *inter vivos* at common law was not effective to pass any title whatever unless it was irrevocable.

Basket vs. *Hassel,* 107 U. S. 602, 614;
Bowen vs. *Kutzner,* 167 Fed. 281, 296 (1908);
Copland vs. *Commissioner,* 41 F (2d) 501, 504 (7th C. C. A. 1930);
Edson vs. *Lucas,* 40 F (2d) 398, 404 (8th C. C. A. 1930).

But it is equally true at common law that a declaration of trust does transfer legal and equitable title in spite of the reservation of a power to revoke.

Jones vs. *Clifton,* 101 U. S. 225 (1879);
Allen vs. *Hendrick,* 104 Ore. 202 (1922);
Baker vs. *Baker,* 123 Md. 32 (1914);
Dickerson's Appeal, 115 Pa. 198 (1887) and cases cited at p. 12 below.

The petitioner cites no authority contrary to this settled principle.

The Board of Tax Appeals in its opinion below recognized this distinction and was at great pains to argue that the statute applied to donative trusts as well as to strict gifts *inter vivos* (R. 201). If the statute did apply only to strict gifts *inter vivos* the petitioner would be out of court, for no such gift occurred.

The Correctness of the Decision Below.

The decision below was right and is squarely supported by the decision of this Court in *Jones* vs. *Clifton*, 101 U. S. 225 (1879), in which this Court said:

> "The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. * * *"
>
> "The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution or devised by will."

It is the common law that the original creation of a revocable trust passes full legal and equitable title to the trustee and beneficiary.

Stone vs. *Hackett*, 12 Gray (Mass.) 227 (1858);
In re Dolan's Estate, 279 Pa. 582 (1924);
Nichols vs. *Emery*, 109 Cal. 323 (1895);
Cramer vs. *Hartford-Connecticut Trust Co.*, 110 Conn. 22 (1929);
Kelly vs. *Parker*, 181 Ill. 49 (1899);
National Newark & Essex Banking Co. vs. *Rosahl*, 97 N. J. Eq. 74 (1925);
Van Cott vs. *Prentice*, 104 N. Y. 45 (1887);
Farmers Loan & Trust Co. vs. *Bowers* 29 F. (2d) 14 (2d C. C. A. 1928);
Law Opinion 1102, Int. Rev. Cum. Bull. I-2, p. 50 (1922).

It is likewise the common law that the reserved power to revoke is not a property right and that its extinction is not a transfer of property.

Jones vs. *Clifton*, 101 U. S. 225 (1879);
Ex parte Gilchrist, 17 Q. B. D. 521 (1886);
In re Hall's Estate, 99 N. J. L. 1 (1923); affirmed without opinion, 100 N. J. L. 405;
In re Dolan's Estate, 279 Pa. 582 (1924);
Shattuck vs. *Burrage*, 229 Mass. 448 (1918).

Moreover, the Court below was dealing with a taxing Act in regard to which a certain strictness of construction is required by the decisions of this Court.

Gould vs. *Gould*, 245 U. S. 151 (1917);
Smietanka vs. *First Trust & Savings Bank*, 257 U. S. 602 (1922);
United States vs. *Merriam*, 263 U. S. 179 (1923);
Crooks vs. *Harrelson*, 282 U. S. 55 (1930);
Iselin vs. *United States*, 270 U. S. 245 (1926).

The Court below was clearly right in holding that the words "transfer * * * by gift * * * of * * * property", in a taxing act subject to the rule of strict construction enjoined upon it by this Court, did not include the extinction of a right of revocation which was "not an interest in the property which can be transferred to another, * * *".

The decision below is also supported by *United States* vs. *Field*, 255 U. S. 257 (1921). Mrs. Field had a life interest in a trust fund and a power of appointment in regard to a portion of it. She exercised the power by will on her death.

The Revenue Act of 1916 imposed a tax on the "transfer of the net estate * * *" and included in that estate "property * * * to the extent of any interest therein of which the decedent has at any time made a transfer * * * intended to take effect in possession or enjoyment at * * * his death * * *". If Mrs. Field transferred property by her exercise of the power of appointment it was, of course, a transfer intended to take effect, and actually taking effect, at her death. The court held that she did not transfer property because she had no ownership of the property covered by the power. There is an exact similarity between the *Field* case and our case except for the difference in the degree of control, if such there be, involved in the possession of a life interest coupled with a general power to appoint and in the possession of a general power to revoke.

The petitioner suggests, on pages 14 and 15 of his brief, that the normal import of the words of the gift tax section of the 1924 Act might be extended if we considered those words in connection with the estate tax provisions. On the contrary, the construction by the Court below of the words of the gift tax section in the Act of 1924 is strongly supported by the contrast between that section, wholly silent as to revocable trusts, and the estate tax and income tax sections [219(g) and 302(d), 43 Stat. 277, 304] of the same Revenue Act, specifically dealing with revocable trusts.

The construction of the Court below is also supported by the history of the construction of the estate tax and income tax sections. The estate tax sections in the early acts did not specifically require the inclusion of property subject to a revocable trust in the gross estate. The Bureau first

ruled in 1919 that such property should be included in the net estate on the donor's death (Art. 25, Reg. 37). This ruling the Bureau rescinded after argument, in 1923 (T. D. 3487, Int. Rev. Cum. Bull. II-1, page 301). In the Act of 1924, however, the Congress added a specific provision requiring the inclusion in the gross estate of property subject to a revocable trust.[1] (Section 302(d).) Thereafter the question was not one of interpretation but one of constitutional power and thereafter the Bureau ruled, and properly ruled, that property subject to a revocable trust was taxable.

Turning to the income tax we find in the early acts no provision relating to the income of a revocable trust. We find again that the Bureau originally ruled that the income of such trusts should be taxed to the donor, (Art. 341, Reg. 45) and we find again that on argument the Bureau rescinded this ruling and held that the income of such trusts, should not be taxed to the donor. This latter holding was based upon a clear statement of the common law by the Solicitor of the Bureau:

> "Essentially the powers reserved in the trust in question do not differ from, nor are they more extensive than, those considered by the United States Supreme Court in the case of *Jones* v. *Clifton*, 101 U. S. 225. As that Court sustained as a legally constituted trust against the seller's creditors the transfer involved therein, there seems no argument available for regarding the trust in question (considered, as here—we must, uninfluenced by any question of taxation under a death duty act, as hereafter pointed out) as not

[1] This court has previously indicated that such a change in a statute will be regarded as amendatory rather than as declaratory. *United States* vs. *Field*, 255 U. S. 257 at p. 264; *Smietanka* vs. *First Trust & Savings Bank*, 257 U. S. 602 at p. 607.

vesting the interests of the beneficiaries *in praesenti*. After the execution and delivery of the trust deed, the trustee became the owner of the legal title, at least so far as was necessary to carry out the purposes of the trust. The beneficiaries could have maintained an action to compel the trustee to make payment of the income from the trust to them as long as they were beneficiaries and the trust remained unrevoked. The death of A merely prevented the trust from being revoked and the removal of any names from the pension list and ended the possibility of the title being divested during his lifetime. However, the extinction of the possibility of the divesting did not result in the vesting of any new right. The right of revocation became extinct, but no property right passed to anyone" (L. O. 1102, Int. Rev. Cum. Bull. I-2, page 50 [1922]).

Thereafter in the Act of 1924 the Congress added a section specifically requiring that the income of a revocable trust should be taxable to the donor. (Section 219(g).) The question then ceased to be one of interpretation and became one of constitutional power and the Bureau thereafter ruled and properly ruled that the income of a revocable trust was taxable to the donor.

The gift tax section when originally enacted in 1924, like the income tax sections and the estate tax sections when originally enacted, contained no language specifically applying to revocable trusts. A question of interpretation only, therefore, arose and was decided in favor of the taxpayer by the Court below, just as the same question had been decided in favor of the taxpayer by the Bureau in the case of the estate tax sections and of the income tax sections in their original form.

In the new Revenue Act of 1932 the Congress has elaborated the gift tax provision by inserting language specifically applying to powers of revocation (Section 501(c), Revenue Act of 1932). The question under the new Revenue Act ceases to be a question of interpretation and becomes one of constitutional power which, if raised, would presumably be decided in favor of the Government, under the decisions of *Chase National Bank* vs. *United States, Reinecke* vs. *Northern Trust Company* and *Corliss* vs. *Bowers,* and in conformity with the dicta and in entire harmony with the decision of the Circuit Court of Appeals below in the case at bar.

There is an element of justice and fair play involved in the decision of the Court below. In 1925, when these powers to revoke were surrendered, there were in existence none of the constitutional cases which the petitioner claims to be in conflict with the decision of the Court below. We had before us then only the *Field* case and *Jones* vs. *Clifton* and the decisions following them, and the cases on the strict construction of taxing statutes. It seemed to be settled law then that the surrender of a power to revoke was not a transfer of property. Once a rule has been announced by the Supreme Court and has become generally understood, then adherence to the rule ceases to be a casual matter. Property must be administered, plans must be made, action must be taken on the faith and credit of the contemporaneous law, and if we are to change that law without notice and by retroactive interpretation we may inflict outrageous injustice upon those who have acted in reliance upon it. It is not a question of the fundamental logic of the rules. It

is a question of the sanctity which inheres in decisions which have been acted upon in good faith. It may be better that taxation should not be "concerned with the refinements of title", but under *Jones* vs. *Clifton* and the *Field* case, and under the cases on the construction of tax statutes, a tax on a transfer of property in the year 1925 was concerned "with the refinements of title". If by any chance there is some public purpose to be served by the abandonment of the old rules and the old meanings of words, let the change take place by Congressional enactment (as it took place in the case of the income and estate tax laws and as it has now taken place in the new gift tax law) and not by retroactive interpretation which falls like a trap upon those who have acted beyond recall.

Conclusion.

Certiorari should be denied.

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APPENDIX.

Gift Tax Provisions, Revenue Act of 1924 and Revenue Act of 1932.

Section 319 of the Revenue Act of 1924 (43 Stat. 313), enacted June 2, 1924, as amended by Section 324 of the Revenue Act of 1926 (44 Stat. 86), provides as follows:

> "For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly:
>
> > "1 per centum of the amount of taxable gifts not in excess of $50,000; * * *" etc., at graduated rates.

This provision was repealed as of January 1, 1926, Section 1200(a), Revenue Act of 1926 (44 Stat. 125).

Section 501 of the Revenue Act of 1932, Public No. 154, 72nd Congress, provides as follows:

> "SEC. 501. IMPOSITION OF TAX.
>
> "(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in Section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.
>
> "(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a non-resident not a

citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

"(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift."

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 283.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

MURRY GUGGENHEIM,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

ELIHU ROOT, JR.,
GEORGE E. CLEARY,
Counsel for Respondent.

ELIHU ROOT,
J. HARRY COVINGTON,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 283

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

AGAINST

MURRY GUGGENHEIM,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Abstract of the Case.

This is a proceeding to review a decision of the Circuit Court of Appeals for the Second Circuit (R. 109), 58 F. (2d) 188, reversing a determination of the Board of Tax Appeals that there was a deficiency in the Respondent's 1925 gift tax of $2,430,544.02 (R. 104) (24 B. T. A. 1181) and holding that there was no deficiency.

In 1917 Murry Guggenheim, the Respondent, created two trusts, one for his son and one for his daughter. In each of these trusts he reserved a power of revocation.

In 1924 a new Revenue Law was passed imposing a tax upon "the transfer * * * by gift * * * of any property" with certain exemptions (Section 319, Revenue Act of 1924).

In 1925 the Respondent relinquished his powers of revocation.

The Commissioner of Internal Revenue assessed a tax upon this relinquishment as a transfer by gift of property (R. p. 8).

The ruling of the Commissioner was sustained by the Board of Tax Appeals (R. p. 92).

The decision of the Board of Tax Appeals was reversed by the Circuit Court of Appeals (R. p. 109).

The matter then came to this Court on certiorari under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (R. p. 116).

There is no disputed question of fact, all facts having been stipulated (R. pp. 10-17).

There is no constitutional question.

The only question in the case is one of the interpretation of the Statute. Are the words "the transfer * * * by gift * * * of any property" to be construed to include the surrender of these powers of revocation?

Summary of Argument.

The transfer of property in connection with these trusts could not have occurred both when the trusts were created and when the powers were extinguished. It occurred when the trusts were created. In 1924 when the act was passed and in 1925 when the powers were extinguished, it was the settled common law that the creation of a voluntary trust, though a power to revoke was reserved, operated as a transfer of property within the common law meaning of that term and passed legal title to the trustee and beneficial title to the *cestui que* trust (*infra*, pp. 8-11).

Conversely, it was settled common law in 1924 and 1925 that a power to revoke was not a property right, and that the extinguishment of such a power was not a transfer of property (*infra*, pp. 11-17).

A comparison of the gift tax section of the 1924 Revenue Act with the other sections of the Act shows that the words "transfer of property" in the gift tax section were not intended to include the extinguishment of powers. The contiguous sections 302(c) and 302(d) of the Act treat transfers of property in contemplation of death and the relinquishment of powers in contemplation of death in contra-distinction. The gift tax omits any language extending its operation to the relinquishment of powers, while the estate tax and income tax sections contain specific and elaborate language relating their operation to the relinquishment of powers (*infra*, pp. 17-19).

In 1924 and 1925, it was the law, and it still is the law and the settled administrative practice, that a donor who creates a revocable trust must pay a stock transfer tax on all shares of stock in the trust when the trust is set up, and, if a revocation later occurs, must pay another stock transfer tax as on a retransfer. The Government has never attempted to impose the stock transfer tax upon the surrender of a power to revoke (*infra*, pp. 19-20).

Taxing statutes in a common law country should be construed strictly against the government and literally in accordance with the common law meaning of their terms (pp. 20-21).

There were in 1924 and 1925 no decisions challenging the rules above set forth. The sole authority against them was a ruling of the Bureau of Internal Revenue under the

gift tax section of the 1924 Act. The Bureau had previously made similar rulings in regard to the estate and income taxes and had reversed them on argument (*infra*, pp. 21-22).

Nothing has happened since 1925 to justify a retroactive change in the old law.

The repetition of the language of the 1924 gift tax in the 1926 Revenue Act was not a legislative approval of the Commissioner's regulation applying the gift tax to the relinquishment of powers, for that repetition was for the purpose of limiting and repealing the older act, and because it lacked all the other elements needed for an inferred legislative approval (*infra*, pp. 23-25).

The cases decided in this court since 1925 in regard to the constitutional power to tax the extinguishment of powers are not in point. They deal with a different question and apply a diametrically opposed rule of presumption (*infra*, pp. 25-33).

The Petitioner's argument that there must have been an implied holding that the extinguishment of the powers in such cases were "transfers of property" at the time of death when the powers were extinguished because the "estate tax" can only be imposed where there is a strict transfer of property at the time of death, is unfounded (*infra*, p. 36).

The recent opinion in *Tyler* v. *United States*, 281 U. S. 497, clearly summarizes the law both on the interpretation of the phrase "transfer of property" and on the constitutional power of Congress to tax the extinguishment of powers. The Respondent stands squarely on the statement of the law set forth in this case (*infra*, pp. 34-36).

To change by retroactive decision the common law meaning of the words used in the 1924 gift tax after taxpayers have acted in reliance on the old meaning would be unjust.

ARGUMENT.

The Creation of the Deeds of Trust.

In 1917 the Respondent, Murry Guggenheim, created two trusts, one for his son and one for his daughter (R. p. 11). The securities were at once transferred to the Commercial Trust Company of New Jersey and Clarence L. Meyers as trustees, and have been held ever since in the trusts. The beneficiaries under the trusts began at once to enjoy the distributable income and have continued in that enjoyment ever since (R. Exs. 2 and 15, pp. 20 and 58). Each trust deed reserved to the donor a power to alter and to revoke except as to accumulated income.

It was customary at that time to insert powers of amendment and revocation in family settlements.

In *Coutts* v. *Acworth*, L. R. 8 Eq. 558 (1869), the Vice-Chancellor said of a family settlement:

> "In my opinion, the fact of there being no such power of revocation is all but a conclusive reason for setting aside the deed. * * *"

This Court said in *Jones* v. *Clifton*, 101 U. S. 225 (1879):

> "the absence of a power of revocation and of appointment to other uses in a deed of family settlement has often been considered a badge of fraud."

Careful practitioners therefore inserted such powers of revocation in all family trusts as a matter of course.

The donor never exercised his powers of revocation as to any portion of either of the trust funds. He never received any income under either of the trusts. He was a man of large property. He had made no other provision for his son and daughter. There is no reason to believe that he ever meant to use the powers of revocation for the purpose of continuing in enjoyment of the property in fact while appearing not to. We are dealing with the effect of a customary technical power of revocation uncomplicated by any extraneous circumstances.

The Revenue Act of 1924.

Before the passage of the Revenue Act of 1924 it had been settled in the Bureau of Internal Revenue that the income of a revocable trust was not taxable to the donor (L. O. 1102, I-2 C. B. 50 (1922)). But the act of 1924 changed this. Section 219(g) of that act provided:

> "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

The Respondent therefore found himself threatened with an income tax amounting under the schedules of the 1924 law to 46% on every dollar of taxable income arising under the two trusts, income which he never received, income

arising from property which he had long ago alienated and which he had no intention of recovering, all because there had been inserted by counsel in the deeds of trust the standard power of revocation. But this is not all.

Section 319 of the same act of 1924 provided:

> "For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly; * * *."

Under this, the Commissioner of Internal Revenue ruled that all instalments of income paid by trustees to beneficiaries while a power to revoke existed would be taxed as gifts (Article 1, Regulations 67). Under this ruling, the donor was threatened with a gift tax on every dollar of income received by the beneficiaries of these trusts. It was an intolerable situation.

The Respondent was entitled to consult counsel as to whether he could not surrender the unfortunate and useless power of revocation, without subjecting himself to a gift tax upon the principal of the two trusts, and counsel were bound to advise, and the Respondent was entitled to act, on the basis of the statutes and decisions as they then stood.

The State of the Law in 1924 and 1925.

Anyone making a full study of the law in 1924 and 1925 would have found the following condition:

FIRST: It was well established that the retention of the customary power to revoke did not impair the validity of a trust nor interfere with the passage of legal title to the trustee and of equitable title to the beneficiaries.

In *Jones* v. *Clifton*, 101 U. S. 225 (1879), this Court had said:

> "The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife. * * *"
>
> "The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will."

In *National Newark & Essex Banking Co.* v. *Rosahl*, 97 N. J. Eq. 74 (1925), the Court said:

> "The trust was completely executed. The property passed out of the donor and vested in the trustee to the beneficial use of the *cestuis que trustent*. * * * If the power of revocation is not exercised, the interest remains vested as though such power had not been reserved. * * * The power is personal to the trustor. * * * The reservation of such power is not inconsistent with the passing of title to the property to the trustee. * * * The omission of such reservation has led to voluntary settlements being set aside on the ground of mistake."

In *Allen* v. *Hendrick*, 104 Oregon 202 (1922), the Supreme Court of Oregon said:

> "Reservation of the right of revocation does not affect the legal title of the property, for that passes and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it."

In *Stone* v. *Hackett*, 12 Gray (Mass.) 227 (1858), the Court said:

> "A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it."

In *Van Cott* v. *Prentice*, 104 N. Y. 45 (1887), the Court said:

> "Neither the power of revocation nor the provision, determining the trust in the event of a legal interference, or the death of the trustee in the life of the settlor, are in the least inconsistent with the trust as completely and perfectly constituted. They both assume its separate and effective existence, and provide merely for its termination upon the happening of specified contingent events."

In *New York Life Insurance & Trust Company* v. *Cary*, 191 N. Y. 33 (1908), the Court said:

> "Whatever may have been accomplished by the trust deed was accomplished immediately upon its delivery to the trustee, accompanied by a transfer of the property therein mentioned. All the rights that Nellie Bostwick Morrell ever acquired in the trust fund she

acquired at that moment. There was no postponement of the enjoyment of those rights until the death of Mr. Bostwick. * * * It has been expressly decided by this Court more than once that the presence of a full power of revocation in an instrument of this character does not render it testamentary."

In *Dickerson's Appeal*, 115 Pa. 198 (1887), the Court said:

"A reserved right of revocation is not inconsistent with the creation of a valid trust. If the right is not exercised during the lifetime of the donor, * * * the validity of the trust remains unaffected, as though there never had been a reserved right of revocation."

In *Windolph* v. *Girard Trust Company*, 245 Pa. 349 (1914), the Court said:

"It is equally well settled that a reserved right of revocation is not inconsistent with the creation of a valid trust."

In *Nichols* v. *Emery*, 109 Cal. 323 (1895), the Court said:

"Nor did the fact that the settlor reserved the power to revoke the trust operate to destroy it, or change its character. He had the right to make the reservation (Civil Code, Section 2280) but the trust remained operative and absolute until the right was exercised in proper mode. *Stone* v. *Hackett*, 12 Gray, 232; *Van Cott* v. *Prentice*, 104 N. Y. 45. Indeed this power of reservation was strongly favored in the case of voluntary settlements at common law, and such trust, without such a reservation, was open to suspicion of undue advantage taken of the settlor * * *"

The same rule still prevails. In *Cramer* v. *Hartford Connecticut Trust Company*, 110 Conn. 22 (1929), the Court said:

> "We have then an instrument under the terms of which the property in question was transferred to a trustee and which created an immediately enjoyable life estate in the settlor and a present vested interest in those named to take at her death, defeasible only in the event that she exercised a reserved power of revocation. *With a striking unanimity of opinion such trusts have been held valid.*" (Italics ours.)

The Petitioner has tried in Point IV of his brief to oppose to these cases a line of decisions to the effect that a gift *inter vivos* at common law could not pass title if there was a power to revoke. That is true of strict gifts *inter vivos*. It is not true of the donative trust nor of the gift *causa mortis*. The argument is based on a confusion of elementary common law rules.

SECOND: It was also settled that a power was not itself property.

> "No two ideas can well be more distinct the one from the other than those of 'property' and 'power' * * * A 'power' is an individual personal capacity of the donee of the power to do some thing. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more is 'property' than the power to write a book or to sing a song." *Ex parte Gilchrist*, 17 Q. B. D. 521 (1886).

This Court said of such a power in *Jones* v. *Clifton*, 101 U. S. 225,

"That power is not an interest in the property * * *."

In *People* v. *Kaiser*, 306 Ill. 313 (1922), the Court said:

"A power of appointment is not an absolute right of property, nor is it an estate, for it has none of the elements of an estate."

In *Melton* v. *Camp*, 121 Ga. 693 (1905), the Court said:

"A power is not property but a mere authority."

The same rule still prevails. It was summarized in *Farmers Loan & Trust Co.* v. *Bowers*, 29 F. (2d) 14 (1928):

"A power to revoke is not a property right, nor an interest in property. *Jones* v. *Clifton*, 101 U. S. 225, 25 L. Ed. 908; *Hill* v. *Nichols* (D. C.) 18 F. (2d) 139; *Reinecke* v. *Northern Trust Co.* (C. C. A.), 24 F. (2d) 91; *In re Dolan's Estate*, 279 Pa. 582, 124 A. 176, 49 A. L. R., 858; *Stone* v. *Hackett*, 12 Gray (Mass.) 227. The power of revocation is perfectly consistent with the creation of a valid trust. Title passes to the donee, and remains vested for the purpose of the trust, even though there may be a right to revoke it."

THIRD: There were two cases in State Courts squarely holding that the extinguishment of a power did not work a transfer of property.

In re Dolan's Estate, 279 Pa. 582 (1924), the Court said:

> "But the right to revoke, unexercised, is a dead thing. Its presence in a deed does not alter the character of the instrument or estate granted; to all intents and purposes, title and possession passed just as effectively as any deed or grant could make it, continuing in that state so long as the power of revocation lies dormant. * * * How then could the extinguishment of the power to revoke the deed of trust by the death of Mrs. Dolan—that is all death accomplished—work a transfer of property? The right of revocation, standing alone, is not tantamount to a property right in the settlor; it possesses none of the attributes of property. Mrs. Dolan did everything possible in 1908 to divest herself of the specific property. When she died in 1920, there was nothing left for her, the law, or any one to do to complete the act. Revocation is neither an estate nor property and cannot pass at death."

In re Hall's Estate, 99 N. J. L. 1, (1923), Francis Hall had made a deed of a business, including the good will, but had reserved the right to retake the good will *without payment*. An attempt was made to tax the extinguishment of this right as a transfer of property. The Court said:

> "But, assuming this view to be unsound, a mere right to acquire the good will of a business, which may be exercised or not at the option of the holder of that right, is not the equivalent of the ownership of the good will. Good will is property. An option to acquire it, if the holder of the option sees fit to exercise it, does not vest in him any ownership of the property itself or of any interest therein. The failure to exer-

> cise that option, or its relinquishment, by the holder transfers nothing to the persons who held the property which was the subject of the option. It merely wipes out the possibility that they may in the future be deprived of their ownership by the exercise of that option. For this reason I conclude that the surrender by Mr. Hall of his right to acquire the good will of this business (assuming that he had such right) did not justify the imposition of a tax upon that surrender, for the reason that section 1 of our Inheritance Tax Law, as amended in 1914, limits the imposition of an inheritance tax to 'the transfer of any property, real or personal * * * or of any interest therein or income therefrom.'"

This opinion in the Supreme Court of New Jersey was affirmed in the Court of Errors and Appeals expressly on the reasoning of the Court below:

> "PER CURIAM. The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Chief Justice Gummere in the Supreme Court" (100 N. J. L. 405).

FOURTH: There was one case in this Court so close as to be fairly considered a controlling authority—*United States* v. *Field*, 255 U. S. 257 (1921).

In 1914 Joseph N. Field died leaving property to trustees to pay the income to his wife Kate for life, and after her death to pay the income of one-half of the fund to such persons as she should by will appoint. Kate Field died in 1917 leaving a will appointing this income to her children. The Commissioner included in the gross estate of Mrs. Field the property covered by the power of appointment.

Section 201 of the Act of 1916 imposed a tax upon the transfer of the net estate of every decedent dying after the passage of the act.

Section 202 provided:

> "Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.
>
> (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth * * *".

There was no specific provision in the Act applying to the exercise of powers of appointment. That provision appeared for the first time in the 1918 Act (Section 402[e]).

The action of the Commissioner was contested and the matter came to this Court. No constitutional question was raised. The only point dealt with was the interpretation of the act. The Government argued that

> "A popular interpretation would include in the estate of a deceased testatrix property over which she enjoyed substantially all the incidents of ownership and of which she disposed at death."

The Court said:

> "No question being suggested as to the power of Congress to impose a tax upon the passing of property under testamentary execution of a power of appointment created before but executed after the passage of the taxing act (see *Chanler* v. *Kelsey*, 205 U. S. 466, 473, 478-479; *Knowlton* v. *Moore*, 178 U. S. 41, 56-61), the case involves merely a question of the construction of the Act. Applying the accepted canon that the provisions of such acts are not to be extended by implication (*Gould* v. *Gould*, 245 U. S. 151, 153), we are constrained to the view—notwithstanding the administrative construction adopted by the Treasury Deparment—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment. * * * It follows that the interest in question, *not having been property of Mrs. Field* at the time of her death, nor subject to distribution as part of her estate, was not taxable under clause (a).
>
> We deem it equally clear that it was not within clause (b). That clause is the complement of (a), and is aptly descriptive of a transfer of an interest in decedent's *own property* in his lifetime, intended to take effect at or after his death. It cannot, without undue laxity of construction, be made to cover a transfer resulting from a testamentary execution by decedent of a power of appointment over *property not his own.*" (Italics ours.)

If the property had belonged to Mrs. Field, and if the exercise of her power of appointment had been a "transfer", it would, of course, have been a "transfer" intended to take effect, and for that matter actually taking effect, at death, and would have fallen within Section 202(b) of the Act.

Observe how closely the question decided resembles that in our own case.

There is a strong similarity between a general power of appointment and a power of revocation. They have been held equivalent for tax purposes. (*Farmers Loan & Trust Company* v. *Bowers*, 29 F. (2d) 14, at page 18; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, at pages 269-270.) Mrs. Field had much the same substantial economic relation to the property covered by her power of appointment that a holder of a power to revoke has. She enjoyed the interest during her life and could appoint the property to whomsoever she chose upon her death. She could have assigned her life interest and appointed to the assignee by will, and could have coupled the appointment with a contract binding upon her estate. At the instant before her death she had, not quite, but, almost the substantial economic powers in relation to the property enjoyed by an absolute owner in fee. At the instant after her death she had none of these powers and the complete ownership and enjoyment was in the appointees. And yet the Court holds that because she did not have title, because she did not in the common law sense, own the property, there was no "transfer" from her to the appointees. The only substantial difference between the *Field* case and our own, is the difference, if any, between the degree of economic control over the property enjoyed by a holder of a power of revocation and by a holder of a life interest plus a general power of appointment.

FIFTH: A comparison of the gift tax section of the 1924 Act with the estate and income tax sections strongly indicated that the gift tax section was not intended to apply to the surrender of powers.

Section 302(c) of the Act of 1924 required the inclusion in the gross estate of property transferred in contemplation of death, and Section 302(d) required the inclusion of property subject to a power of revocation relinquished in contemplation of death. The later provision would have been sheer surplusage if the relinquishment was a transfer. If the relinquishment was a transfer it was covered by Section 302(c).

Moreover, Congress had inserted for the first time in the 1924 Act, in connection with the estate tax, a provision (Section 302(d)) that there should be included in the gross estate all property

> "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to *any change through the exercise of a power*, either by the decedent alone or in conjunction with any person, *to alter, amend, or revoke*, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;" (Italics ours)

In other words, Congress in the Revenue Act of 1924 for the first time specifically provided that trust property subject to a power of revocation should be included in the gross estate of a decedent, that is to say, treated as though it had been transferred on the extinction of the power, and Congress in the gift tax sections of the *same* statute completely omitted any such provision.

Turning to the income tax provisions of the Revenue

Act of 1924, we find appearing for the first time the following:

> "Section 219(g). Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

In other words, the Act of 1924 for the first time provided that for income tax purposes a revocable trust should be treated as though the transfer of the trust property did not take place until the extinction of the power of revocation, and, as we have said before, Congress entirely omitted any such provision in the gift tax sections of the act.

There is on the face of the statute the clearest indication that Congress knew the old rule that the extinction of a power was not a transfer of property, that Congress well knew how by appropriate, specific and effective language, to change that rule when it so desired, that Congress did desire to change that rule in the case of the income tax and the estate tax, and did so change it, that Congress did *not* desire to change the rule in the case of the gift tax and did not change it in the case of that tax.

Congress might have applied the gift tax to the extinguishment of a power of revocation *but it did not do so.*

SIXTH: In 1924 and 1925, it was the law, and it still is the law and the settled administrative practice, that a donor who creates a revocable trust must pay a stock transfer tax on all shares of stock in the trust when the

trust is set up, and, if a revocation later occurs, must pay another stock transfer tax as on a retransfer. Schedule A-3, Section 807, Revenue Act of 1924; Section 723, Revenue of 1932. The Government has never attempted to impose the stock transfer tax upon the surrender of a power to revoke.

SEVENTH: It was a settled rule of the common law that tax statutes were to be construed strictly and according to the common law meaning of their terms.

The recognized general principle was applied and stated by this Court in *United States* v. *Merriam*, 263 U. S. 179 (1923), the Court saying (pp. 187-188):

> "The word 'bequest' having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress. *Kepner* v. *United States*, 195 U. S. 100, 124; *The Abbotsford*, 98 U. S. 440, 444.
>
> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151, 153. The rule is stated by Lord Cairns in *Partington* v. *Attorney General*, L. R. 4 H. L. 100, 122."

For the sake of brevity we omit a general citation of authority on this point. The rule was unquestioned. It

had been stated and applied a hundred times in the Federal Courts.

Nor has there been any relaxation in this principle of construction since 1925. It was applied with exact severity in the recent case of *Crooks* v. *Harrelson*, 282 U. S. 55 (1930), where the Court excluded from a decedent's gross estate realty in Missouri an account of a peculiarity of local law exempting realty from liability for administration expenses. The Court said:

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness."

EIGHTH: There was in 1924 and 1925 no decision and no language of any court at variance in any way with the indications above set forth.*

The sole inconsistent authority was a ruling of the Bureau of Internal Revenue (Article 1, Regulations 67) promulgated after the 1924 Act, to the effect that the creation of a revocable trust was not a gift, but that a gift occurred upon the termination of the power.

The Bureau of Internal Revenue had twice before made rulings based on the theory that a transfer occurred on the surrender of a power of revocation and had, in each case,

* The Petitioner claims that *Bullen* v. *Wisconsin*, 240 U. S. 625 (1916), was contrary to the conclusions reached above. He is in error. The trust deed in that case was a peculiar one. It provided "During my life time the *principal* and income shall be used for such beneficiaries and in such manner as I *may from time to time appoint*". The Supreme Court of Wisconsin held that under this trust "an inheritance tax was due in respect of the whole fund as upon a transfer intended to *take effect in enjoyment* after the donor's death" —All this court did was to hold that this action did not violate the Fourteenth Amendment.

reversed its ruling after argument. The Bureau had ruled the income of a revocable trust must be taxed to the donor (Par. 194, Reg. 33 (rev.) Art. 341, Reg. 45), this in 1918 before any special provision was inserted in the Income Tax Law requiring such a result, and the Bureau had rescinded this ruling upon argument saying "* * * the extinction of the possibility of a divesting did not result in the vesting of any new right. The right of revocation became extinct, but no property right passed to any one" (see Art. 341, Reg. 62 [1921]; L. O. 1102, I-2 C. B. 50 [1922]). The Bureau ruled under the Estate Tax in 1919, before any special provision was inserted in the statute, that property in a revocable trust should be included in the donor's estate at death (Art. 25, Reg. 37; and Art. 21, Reg. 63). This ruling the Bureau rescinded after argument in 1923 (T. D. 3487, II-1 C. B. 303). Just prior to the Act of 1924 the Bureau of Internal Revenue itself did not believe that the extinction of a power to revoke was a transfer of property.

Could any court on that state of law have said that the surrender of a power of revocation was *clearly and without question* a "transfer * * * of * * * property" and therefore, under the rule of construction, taxable within the gift tax section? We think not.

The Surrender of the Powers of Revocation.

In 1925 the Respondent did take advice of counsel, was advised that the surrender of the powers of revocation would not constitute a transfer of property, and did surrender the powers under both trusts.

The Authorities Since 1925.

Has anything happened since the year 1925 when the powers of revocation were extinguished to change the state of the law?

There have been two decisions on our point under the gift tax section of the Revenue Act of 1924. The first of these decisions was that of the Court of Claims in *Means* v. *United States*, 39 F. (2d) 748 (1930). That decision is squarely against us. The other is the decision of the Circuit Court of Appeals in the case at bar. That decision is in our favor.

The Petitioner claims that the later repetition in the 1926 Act of the words of the old 1924 gift tax section was a legislative approval of the regulation under which the tax was imposed, and had the effect of making the regulation retroactively valid even though it was invalid at the time when it was promulgated. The cases do not bear out this unreasonable position. In *Iselin* v. *United States*, 270 U. S. 245, the Court said at page 251:

> "The Government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the

tax here in question was assessed; that on March 22, 1920, the Attorney General sustained that ruling; that the provisions here in question were re-enacted without substantial change in the Revenue Act of 1921, Act of November 23, 1921, § 800(a), c. 136, 42 Stat. 227, and the Revenue Act of 1924, Act of June 2, 1924 § 500(a), c. 234, 43 Stat. 253; and that the administrative practice adopted in 1919 has been steadfastly pursued. It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long-continued; neither is the statute ambiguous. Such departmental construction cannot be given the force and effect of law. Compare *United States* v. *Falk & Brother*, 204 U. S. 143; *National Lead Co.* v. *United States*, 252 U. S. 140, 146."

The presumption is one the strength of which depends upon the circumstances. The repetition of the language of the 1924 gift tax section in the 1926 Act was for the purpose of lowering the rates of tax on gifts already made and for the purpose of repealing and abolishing the gift tax for the future. Any inference that by such a repetition of language Congress intended to extend the meaning of the Act as originally passed is very faint.

Congress has recently reimposed the gift tax, but has changed it by inserting a section making the tax payable, not only on strict transfers of property as under the old act, but, also on the relinquishment of powers to revoke. Section 501, Revenue Act of 1932. Under the dictum of this Court at the end of the *Field* case, above cited, a presumption would arise from this that the

Congress did not intend to have the earlier form of the gift tax apply to powers to revoke. But, here again the presumption is not a conclusive one. It should be enough, however, to destroy any effect of the argument based on the earlier re-enactment without change.

There have been five cases in this Court which are cited by the Government and which merit careful consideration.[1]

Let us consider these cases seriatim.

First

Saltonstall v. *Saltonstall*, 276 U. S. 260 (1928).

In 1905 Peter C. Brooks, in Massachusetts, created two trusts reserving the income for life and a power to revoke with the concurrence of one trustee. Thereafter the legislature of Massachusetts passed an act providing that the failure to exercise a power of appointment should be taxable under the statute taxing inheritances. The words of the statute were:

> "Whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor in whole or in part, a disposition of property taxable under the provisions of Chapter 563 of the acts of the year 1907 and all acts in amendment thereof and in addition thereto, shall be deemed to take place to the extent of such omission or failure."

[1] *Poe* v. *Seaborn*, 282 U. S. 101, was also cited. It has no bearing on our point. It held that California could not tax a husband on the entire income of community property in spite of his broad powers of control.

Mr. Brooks died after the passage of this act without revoking the trusts. A tax having been levied the State Court held

> "that the provisions of the trust instrument for change or termination of the trust by Peter C. Brooks with the consent of one trustee created a power of appointment * * *."

and sustained the tax. The taxpayer appealed to the Supreme Court of the United States on constitutional grounds. This Court had before it no question of the construction of the state statute. It recited the holding of the Massachusetts courts to the effect that the right of revocation was equivalent to a power of appointment and, following the usual rule for the interpretation of state statutes already construed by the local courts, said:

> "This construction of the statutes by the state court we accept."

The only question before this Court was a constitutional one. In the words of the Court:

> "we consider only the single objection discussed as a federal question by that court in its opinion, viz., that the statutes as applied deprive plaintiffs in error of their property without due process of law because retroactive as to them."

The Court went on to say on page 271 that the statute was not retroactive and unconstitutional because something did occur on the extinguishment of the right of revocation which might be made the subject of a tax, that "A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax."

The Court ends its opinion by saying:

> "we need not go further than to say that the statute of 1909, imposing the tax because of the failure to exercise the power of appointment, does not deprive plaintiffs in error of their property without due process of law."

The opinion in the *Saltonstall* case contains language which taken out of its context might help the Petitioner, but we must remember that this Court in the *Saltonstall* case was not deciding whether the words "transfer of property" as used in a tax statute clearly included the extinguishment of a power to revoke. The Massachusetts courts had already decided that the general power to revoke was a power of appointment, and the statute expressly and clearly taxed the extinguishment of such a power. All this Court did was to say that such an act was not so unreasonable as to deprive the plaintiff of his property without due process of law. The only thing which the court had to hold was that the extinguishment of the power was something on which the Legislature *could impose an excise tax.*

Not only was the Court determining a question quite different from the one involved in our own case, but it was applying a diametrically opposite rule of presumption. The Court is bound in *construing* a tax statute to take every intendment in favor of the taxpayer, but once the act has been so drafted as to clearly apply, then the Court must take every intendment in favor of its constitutionality.

> "Every presumption is to be indulged in favor of the validity of the statute."
>
> (*Graves* v. *Minnesota*, 272 U. S. 425.)

Second.

Chase National Bank v. *United States*, 278 U. S. 327 (1929)

Herbert W. Brown was the holder of three insurance policies on his own life. Each policy named his wife as beneficiary and each reserved to Mr. Brown the right of changing the beneficiary. These policies were all taken out on September 13, 1922, after the effective date of the Revenue Act of 1921. In April, 1924 Mr. Brown died, having made no change in the beneficiary of the policies. The Commissioner included the amount of the policies, less the statutory exemption, in the gross estate. Suit was brought in the Court of Claims, which certified the following questions:

> "Question I: Whether the tax imposed by the final clause of section 402(f), Revenue Act of 1921, 42 Stat. 278, on life insurance policies payable in terms to beneficiaries 'other than the decedent or his estate' is a direct tax on property and void because not apportioned.
>
> "Question II. Whether the $9,146.76 tax imposed bears such an unreasonable relation to the subject matter of the tax as to render it void."

Section 402 of the Revenue Act of 1921 provided that there should be included in the gross estate of the decedent all property:

> "(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the

> excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The Court said:

> "In the present case there is no question of the construction of the statute. The tax is plainly imposed by the explicit language of §§ 401 and 402(f) if those sections are constitutionally applied."

The Court held that the tax was not a direct tax, and, then, dealing with Question II, decided that the extinction by death of the power to change beneficiaries was constitutionally capable of being taxed. The Court said:

> "* * * The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, * * *."

In coming to its conclusion the Court used language which, taken out of the context, might be helpful to the Petitioner in our case. The Court spoke of the termination of the right to change beneficiaries as "no less a transfer within the reach of the taxing power than a transfer effected in other ways through death". But we must remember that the Court was dealing with a statute specifically providing (Revenue Act of 1921, § 402(f)) that there should be included in the gross estate insurance in excess of $40,000 under policies taken out by the decedent in favor of others. The act by special definition and for *estate tax* purposes treats the extinction of the right to change beneficiaries as though it were a transfer of part of the net estate. There

could be no question of construction. The words of the statute applied with absolute clearness. The only question was one of constitutionality. To support the statute the court had only to hold that the termination of the right to change beneficiaries was a thing which the Congress could constitutionally tax. It did not have to hold, and did not hold, that the extinction of the power would have fallen within the term "transfer of property" if used in a taxing act without further elaboration.

Third.

Reinecke v. *Northern Trust Company*, 278 U. S. 339 (1929).

A. C. Bartlett created two trusts in 1903 and 1910, prior to the passage of the estate tax law. In these trusts he reserved the income to himself for life, with remainders over, and also reserved a power of revocation. He died in 1922 without having revoked either of the trusts. The 1921 Revenue Act provided, by § 402(c) that there should be included in the gross estate of a decedent all property,

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except * * *."

The Commissioner included the trust property in the gross estate. The tax was contested and the matter came to this Court, which sustained the Commissioner.

The opinion of the Court deals not only with the "two

trusts" mentioned, but with a quite different set of questions regarding five other trusts which were not revocable without the assent of the beneficiary and which the Court held not to be the basis for a tax.

The only ground on which the tax was opposed as to the "two trusts" was that, if applied to them, the statute would be unconstitutional because retroactive. The Court said on page 345:

> "As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of *Nichols* v. *Coolidge*, 274 U. S. 531. In that case it was held that the provisions of the similar § 402 of the 1918 Act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void, as respects transfers completed before any such statute was enacted. But in *Chase National Bank* v. *United States*, decided this day, *ante*, p. *327*, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence § 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank* v. *United States*, *supra*, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed."

Here, again, it is clear that the Court is dealing not with a question of construction but with the question of constitutionality. It is dealing with the point which is conceded in our case.

But it is argued that though the Court purported to deal with a constitutional question there must have been involved a holding that there was a transfer of property at death when the power to revoke was extinguished, because a transfer of property at death was the only thing which the statute purported to tax. That argument is unfounded. Section 402(c) of the Revenue Act of 1921, under which the case arose, does not apply in terms to transfers at death. It applies to transfers made by the decedent "at any time * * * intended to *take effect in possession or enjoyment at or after his death.*" Under that section the court was not called upon to hold that a transfer of property occurred at death when the power was extinguished. It was called upon to hold that the transfer of property which took place when the trust was created took effect in possession or enjoyment at death when the power was extinguished and the enjoyment of the income shifted.

Fourth.

Corliss v. *Bowers*, 281 U. S. 376 (1930).

This was a case under the income tax law. Corliss in 1922 created a trust to pay the income to his wife for life, with remainder over to their children. He reserved a power to revoke the trust. The Commissioner assessed a tax on

the donor under Section 219(g) of the Revenue Act of 1924. That section provided:

> "(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

This Court sustained the action of the Commissioner. Here again the opinion contains language which taken out of context might help the Petitioner. But here again there was no question of construction. The statute clearly applied. The only question was the constitutional one. The Court said:

> "The question raised by the petitioner is whether the above section of the Revenue Act can be applied constitutionally to him * * *."

These four cases, the *Saltonstall* case, the *Chase* case, the *Reinecke* case and the *Corliss* case, are all dealing with the question of the constitutionality of clearly applicable statutes. The rule which the Court was bound to apply in those cases was that "every presumption is to be indulged in favor of the validity of the statute." The Court was not dealing with the interpretation of a tax act and was not applying the rule of strict construction in favor of the taxpayer, applicable in such cases.

Fifth.

That this is not a fanciful distinction is shown clearly in the case of *Tyler* v. *U. S.*, 281 U. S. 497 (1930), decided later than any of the four cases above referred to.

In that case the Court was dealing with the imposition of an estate tax on property subject to an estate by the entireties. It said:

> "Section 201 imposes the tax 'upon the transfer of the net estate'; *and if that section stood alone, the inclusion of such property in the gross estate of the decedent probably could not be justified by the terms of the statute.* But Section 202 definitely includes the property and brings it within the reach of the words imposing the tax; so that a basis for the constitutional challenge is present. Prior decisions of this court do not solve the problem thus presented, though what was said in *Chase National Bank* v. *United States*, 278 U. S. 327, 337-339; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348; and *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271, constitutes helpful aid in that direction.
>
> Death duties rest upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and 'it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' *Knowlton* v. *Moore*, 178 U. S. 41, 56, 57. But mere names and definitions, however important as aids to understanding, do not conclude the lawmaker, who is free to ignore them and adopt his own. *Karnuth* v. *United States*, 279 U. S. 231, 242. A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress, in respect of some events not necessary now to be de-

scribed more definitely, undoubtedly may impose. If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.

The question here, then, is, *not* whether there has been, *in the strict sense of that word, a 'transfer' of the property* by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights." (Italics ours.)

The Court says that a tax in respect of what happens on the extinguishment of the rights of a dying tenant by the entireties "probably could not be justified by the terms" of a statute simply imposing a tax "upon the *transfer* of the net estate", but that where words are added to the statute specifically to include such an occurrence the question becomes a constitutional one and that the change in the rights of the parties occurring on death, while they may not be strictly a transfer, are a bringing into being or ripening for the survivor of property rights of such character as to make appropriate the imposition of a tax. Does that not solve our problem? Are not the rights to revoke, or appoint, or change beneficiaries in the *Saltonstall*, *Chase*

and *Reinecke* cases clearly like this right of the dying tenant by the entireties?—rights on whose extinguishment a tax *"probably could not be justified by the terms of the statute"* if it simply imposed a tax upon the transfer of property, but, nevertheless, rights whose extinguishment does give rise to a change in the situation of the parties such that it *can constitutionally* be taxed by clear and appropriate language? The *Tyler* case has recently been followed. *Gwinn* v. *Commissioner,* decided by this Court Dec. 5, 1932; *Lang* v. *Commissioner,* 61 F. (2d) 280; *Hernandez* v. *Becker,* 54 F. (2d) 542.

The petitioner, on page 18 of his brief, has suggested an argument to the effect that if Congress calls a tax an estate tax it cannot make it apply to anything but transfers of property at death, and, therefore, that the *Saltonstall, Chase* and *Reinecke* cases must have involved holdings that the extinguishment of the powers in those cases resulted in transfers of property at death. That argument is unsound. The Congress can call a tax an estate tax and make its imposition or its measure depend upon transactions not amounting to transfers of property at death. This is clear from the opinion in the *Tyler* case, and from the cases which follow it, cited above on this page. It is also clear from the cases on transfers in contemplation of death. *Milliken* v. *United States,* 283 U. S. 15; *United States* v. *Wells,* 283 U. S. 102.

There is nothing in this state of the authorities to justify a retroactive abandonment of the old rule of the strict con-

struction of tax statutes or of the old law that a power was not property and that its extinguishment did not constitute a transfer of property.

General Considerations.

The real argument which we have to meet is not that this Court in the *Saltonstall, Chase, Reinecke* and *Corliss* cases was deciding a point like our own, for it patently was not.

The real argument which we have to meet is that taxation is a practical matter and should concern itself with the substance of the thing upon which the tax is imposed rather than with legal forms of expression, that the old rule of literal and strict construction of taxing acts should be abandoned as artificial and a new rule of liberal construction adopted. That is the very argument which was made and rejected in *United States* v. *Merriam,* 263 U. S. 179, at p. 187. Such a change might be justified if accomplished by statutory enactment, although it would substitute a new and vague concept for an old and very definite one in a field where certainty is of great importance. But once a rule affecting property has become established, a *retroactive* change involves elements of injustice. If the business of the world is to go on plans must be made and action must be taken on the faith of the contemporaneous law, and if we are to change that law retroactively, we may inflict a very real wrong upon those who have acted in reliance upon it. It is not a question of the fundamental logic of the rules. It is a question of the sanctity inherent in decisions which have endured for years and which have been

acted upon in good faith. If there is some public purpose to be served by the abandonment of the old rules and the old meanings of words, let the change take place by Congressional enactment (as it took place in the case of the income and estate tax laws and as it has since taken place in the gift tax law) and not by retroactive interpretation which falls like a trap upon those who have acted beyond recall.

Respectfully submitted,

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 283.—October Term, 1932.

David Burnet, Commissioner of Internal Revenue, Petitioner, *vs.* Murry Guggenheim, Respondent. | On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

[February 6, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The question to be decided is whether deeds of trust made in 1917, with a reservation to the grantor of a power of revocation became taxable as gifts under the Revenue Act of 1924 when in 1925 there was a change of the deeds by the cancellation of the power.

On June 28, 1917, the respondent, a resident of New York, executed in New Jersey two deeds of trust, one for the benefit of his son, and one for the benefit of his daughter. The trusts were to continue for ten years, during which period part of the income was to be paid to the beneficiary and part accumulated. At the end of the ten year period the principal and the accumulated income were to go to the beneficiary, if living; if not living, then to his or her children; and if no children survived, then to the settlor in the case of the son's trust, and in the case of the daughter's trust to the trustees of the son's trust as an increment to the fund. The settlor reserved to himself broad powers of control in respect of the trust property and its investment and administration. In particular, there was an unrestricted power to modify, alter or revoke the trusts except as to income, received or accrued. The power of investment and administration was transferred by the settlor from himself to others in May, 1921. The power to modify, alter or revoke was eliminated from the deeds, and thereby canceled and surrendered, in July, 1925.

In the meanwhile Congress had passed the Revenue Act of 1924 which included among its provisions a tax upon gifts. "For the calendar year 1924 and each calendar year thereafter . . . a

tax . . . is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly," the tax to be assessed in accordance with a schedule of percentages upon the value of the property. 43 Stat. 253, 313, c. 234, secs. 319, 320; 26 U. S. Code, secs. 1131, 1132.

At the date of the cancellation of the power of revocation, the value of the securities constituting the corpus of the two trusts was nearly $13,000,000. Upon this value the Commissioner assessed against the donor a tax of $2,465,681, which the Board of Tax Appeals confirmed with a slight modification due to a mistake in computation. The taxpayer appealed to the Court of Appeals for the second circuit, which reversed the decision of the Board and held the gift exempt. 58 F. (2d) 188. The case is here on certiorari.

On November 8, 1924, more than eight months before the cancellation of the power of revocation, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, adopted and promulgated the following regulation: "The creation of a trust where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised, a taxable transfer will be treated as taking place in the year in which such power is terminated." Regulations 67, Article I.

The substance of this regulation has now been carried forward into the Revenue Act of 1932, which will give the rule for later transfers. Revenue Act of 1932, c. 209; 47 Stat. 169, 245; sec. 501 (c).*

*Sec. 501 (c): "The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift."

We think the regulation, and the later statute continuing it, are declaratory of the law which Congress meant to establish in 1924.

"Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss* v. *Bowers*, 281 U. S. 376, 378. Cf. *Chase National Bank* v. *United States*, 278 U. S. 327; *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Tyler* v. *United States*, 281 U. S. 497, 503; *Burnet* v. *Harmel*, — U. S. —; *Palmer* v. *Bender*, — U. S. —. While the powers of revocation stood uncanceled in the deeds, the gifts, from the point of view of substance, were inchoate and imperfect. By concession there would have been no gift in any aspect if the donor had attempted to attain the same result by the mere delivery of the securities into the hands of the donees. A power of revocation accompanying delivery would have made the gift a nullity. *Basket* v. *Hassell*, 107 U. S. 602. By the execution of deeds and the creation of trusts, the settlor did indeed succeed in divesting himself of title and transferring it to others (*Stone* v. *Hackett*, 12 Gray [Mass.] 227; *Van Cott* v. *Prentice*, 104 N. Y. 45; *National Newark & Essex Banking Co.* v. *Rosahl*, 97 N. J. Eq. 74; *Jones* v. *Clifton*, 101 U. S. 225), but the substance of his dominion was the same as if these forms had been omitted. *Corliss* v. *Bowers*, *supra*. He was free at any moment, with reason or without, to revest title in himself, except as to any income then collected or accrued. As to the principal of the trusts and as to income to accrue thereafter, the gifts were formal and unreal. They acquired substance and reality for the first time in July, 1925, when the deeds became absolute through the cancellation of the power.

The argument for the petitioner is that Congress in laying a tax upon transfers by gift made in 1924 or in any year thereafter had in mind the passing of title, not the extinguishment of dominion. In that view the transfer had been made in 1917 when the deeds of trust were executed. The argument for the Government is that what was done in 1917 was preliminary and tentative, and that not till 1925 was there a transfer in the sense that must have been present in the mind of Congress when laying a burden upon gifts. Petitioner and Government are at one in the view that from the extiguishment of the power there came about a change of legal rights and a shifting of economic benefits which Congress

respondent

was at liberty, under the Constitution, to tax as a transfer effected at that time. *Chase National Bank* v. *United States, supra; Saltonstall* v. *United States, supra; Tyler* v. *United States, supra; Corliss* v. *Bowers, supra.* The question is not one of legislative power. It is one of legislative intention.

With the controversy thus narrowed, doubt is narrowed too. Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice, between the one date and the other. To arrive at a decision, we have therefore to put to ourselves the question, which choice is it the more likely that Congress would have made? Let us suppose a revocable transfer made on June 3, 1924, the day after the adoption of the Revenue Act of that year. Let us suppose a power of revocation still uncanceled, or extinguished years afterwards, say in 1931. Did Congress have in view the present payment of a tax upon the full value of the subject matter of this imperfect and inchoate gift? The statute provides that upon a transfer by gift the tax upon the value shall be paid by the donor (43 Stat. 316, c. 234, sec. 324), and shall constitute a lien upon the property transferred. 43 Stat. c. 234, secs. 324, 315. By the act now in force, the personal liability for payment extends to the donee. Act of June 6, 1932, c. 209, sec. 510; 47 Stat. 249; 26 U. S. Code, sec. 1136 (j). A statute will be construed in such a way as to avoid unnecessary hardship when its meaning is uncertain. *Hawaii* v. *Mankichi*, 190 U. S. 197, 214; *Sorrells* v. *United States*, — U. S. —. Hardship there plainly is in exacting the immediate payment of a tax upon the value of the principal when nothing has been done to give assurance that any part of the principal will ever go to the donee. The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall.

The ~~petitioner~~ respondent invokes the rule that in the construction of a taxing act doubt is to be resolved in favor of the taxpayer. *United States* v. *Merriam,* 263 U. S. 179; *Gould* v. *Gould,* 245 U. S. 151. There are many facets to such a maxim. One must view them all, if one would apply it wisely. The construction that is liberal to one taxpayer may be illiberal to others. One must strike a balance of advantage. It happens that the taxpayer before us made his deeds in 1917, before a transfer by gift was subject to a tax. We shall alleviate his burden if we say that the gift was then complete. On the other hand, we shall be heightening the burdens of taxpayers who made deeds of gift after the Act of 1924. In making them, they had the assurance of a treasury regulation that the tax would not be laid, while the power of revocation was uncanceled, except upon the income paid from year to year. They had good reason to suppose that the tax upon the principal would not be due until the power was extinguished or until the principal was paid. If we disappoint their expectations, we shall be illiberal to them.

The tax upon gifts is closely related both in structure and in purpose to the tax upon those transfers that take effect at death. What is paid upon the one is in certain circumstances a credit to be applied in reduction of what will be due upon the other, 43 Stat. 315, sec. 322, 26 U. S. C., sec. 1134. The gift tax is Part II of Title III of the Revenue Act of 1924; the Estate Tax is Part I of the same title. The two statutes are plainly *in pari materia.* There has been a steady widening of the concept of a transfer for the purpose of taxation under the provisions of Part I. *Tyler* v. *United States, supra; Chase National Bank* v. *United States, supra; Saltonstall* v. *Saltonstall, supra;* cf. *Bullen* v. *Wisconsin,* 240 U. S. 625. There is little likelihood that the lawmakers meant to narrow the concept, and to revert to a construction that would exalt the form above the substance, in fixing the scope of a transfer for the purposes of Part II. We do not ignore differences in precision of definition between the one part and the other. They cannot obscure identities more fundamental and important. The tax upon estates, as it stood in 1924, was the outcome of a long process of evolution; it had been refined and perfected by decisions and amendments almost without number. The tax on gifts was something new. Even so, the concept of a transfer, so painfully de-

veloped in respect of taxes on estates, was not flung aside and scouted in laying this new burden upon transfers during life. Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title. The word had gained a new color, the result, no doubt in part, of repeated changes of the statutes, but a new color none the less. Cf. *Towne* v. *Eisner*, 245 U. S. 418, 425; *Int. Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Gooch* v. *Oregon Short Line Co.*, 258 U. S. 22, 24; *Hawks* v. *Hamill*, — U. S. —.

The respondent finds comfort in the provisions of section 302 (d) of the Act of 1924, governing taxes on estates.* He asks why such a provision should have been placed in Part I and nothing equivalent inserted in Part II, if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. Section 302 (d) of the Act of 1924 is in part a reënactment of a section of the Revenue Acts of 1918 and 1921, though it has been changed in particulars. 40 Stat. 1097, c. 18, sec. 402 (c); 42 Stat. 227, c. 136, sec. 402 (c). Cf. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. It is an outcome of that process of development which has given us a rule for almost every imaginable contingency in the assessment of a tax under the provisions of Part I. No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of Part II. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer. Here as so often there is a choice between uncertainties. We must be content to choose the lesser. To lay the tax at once, while the deed is subject to the power, is to lay it on a gift that may never become consummate in any real or

*By section 302 (d), the gross estate of a decedent is to be taken as including the subject of any trust which he has created during life "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of death, except in case of a bona fide sale for a fair consideration in money or money's worth."

By section 302 (h), the foregoing subdivision (d), as well as many others, is declared to "apply to the transfers, trusts, estates, interests, rights, powers, and relinquishments of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised or relinquished before or after the enactment of this act."

beneficial sense. To lay it later on is to unite benefit with burden. We think the voice of Congres has ordained that this be done.

Precedents are cited as opposed to our conclusion. We find none of them decisive.

United States v. *Field,* 255 U. S. 257, holds that under the Revenue Act of 1916 (39 Stat. 777, c. 463), the subject of a power created by another is not a part of the estate of the decedent to whom the power was committed. It does not hold that a revocable conveyance *inter vivos* is a perfected transfer by gift that will justify the immediate imposition of a tax upon the value. There was no such question in the case.

Jones v. *Clifton,* 101 U. S. 225, holds that a power of revocation in a deed of conveyance from a husband to his wife does not avail without more to invalidate the transaction as one in fraud of creditors. A transfer within the meaning of a taxing act may or may not be one within the statute of Elizabeth.

We are referred to cases in the state courts, from Pennsylvania and New Jersey. *In re Dolan's Estate,* 279 Pa. St. 582; *In re Hall's Estate,* 99 N. J. Law 1. In neither did the court decide that a conveyance *inter vivos* was taxable as a present gift when the conveyance was subject to revocation at the pleasure of the grantor. No such statute was involved. In each the ruling was that upon the death of the grantor the subject of the conveyance was not taxable as part of his estate, and hence not taxable at all. The ruling might have been different if a choice had been necessary between taxing the conveyance, or its subject, while the power was outstanding, and taxing it later on. New channels of thought cut themselves under the drive of a dilemma.

A decision of the Court of Claims, *Means* v. *United States,* 69 C. Cls. 539, upholds the contention of the Government that within the meaning of the act of Congres the termination by a settlor of the power to revoke a trust is a transfer of the property and as such subject to taxation.

The argument for the respondent, if pressed to the limit of its logic would carry him even farther than he has claimed the right to go. If his position is sound that a power to revoke does not postpone for the purpose of taxation the consummation of the gift, then the income of these trusts is exempt from the tax as fully as the principal. What passed to the beneficiaries was the same in either case, an interest inchoate and contingent till rendered abso-

lute and consummate through receipt or accrual before the act of revocation. Congress did not mean that recurring instalments of the income, payable under a revocable conveyance which had been made by a settlor before the passage of this statute, should be exempt, when collected, from the burden of the tax.

The judgment is

Reversed.

The CHIEF Justice took no part in the consideration or decision of this case.

Mr. Justice SUTHERLAND and Mr. Justice BUTLER are of opinion that the termination of the donor's power of revocation was not a transfer by gift of any property within the meaning of the statute, and that the judgment of the Circuit Court of Appeals should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.